No. 7937

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RICHARD C. HYLAND, doing business under the fictitious name and style of Hyland Bag Company, *Appellant,*

vs.

MILLERS NATIONAL INSURANCE COMPANY (a corporation), DUBUQUE FIRE & MARINE INSURANCE COMPANY (a corporation), NATIONAL RESERVE INSURANCE COMPANY (a corporation), MINNESOTA FIRE INSURANCE COMPANY (a corporation), FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY (a corporation), THE MERCHANTS FIRE INSURANCE COMPANY (a corporation), WESTERN INSURANCE COMPANY OF AMERICA (a corporation), and NATIONAL LIBERTY INSURANCE COMPANY (a corporation), *Appellees.*

APPELLANT'S REPLY BRIEF.

MORGAN V. SPICER,
Mills Building, San Francisco,
Attorney for Appellant.

WILLIAM S. GRAHAM,
57 Post Street, San Francisco,
W. W. SANDERSON,
Mills Building, San Francisco,
J. W. MCCAUGHEY,
Mills Building, San Francisco,
ROBERT W. JENNINGS,
Mills Building, San Francisco,
California State Life Building, Sacramento,
W. H. METSON,
Balboa Building, San Francisco,
Of Counsel.

Subject Index

Table of Authorities Cited

No. 7937

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RICHARD C. HYLAND, doing business under the fictitious name and style of Hyland Bag Company, *Appellant,*

vs.

MILLERS NATIONAL INSURANCE COMPANY (a corporation), DUBUQUE FIRE & MARINE INSURANCE COMPANY (a corporation), NATIONAL RESERVE INSURANCE COMPANY (a corporation), MINNESOTA FIRE INSURANCE COMPANY (a corporation), FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY (a corporation), THE MERCHANTS FIRE INSURANCE COMPANY (a corporation), WESTERN INSURANCE COMPANY OF AMERICA (a corporation), and NATIONAL LIBERTY INSURANCE COMPANY (a corporation), *Appellees.*

APPELLANT'S REPLY BRIEF.

INTRODUCTION.

Appellant appreciates the deep interest manifested by the court upon the oral argument of this case, and avails himself of the privilege allowed of filing this reply brief.

The appellees upon the oral argument have cloaked their failure and refusal to pay appellant the loss which he sustained by insinuations of incendiarism directed against the appellant, and by unfair statements concerning appellant's testimony and the basis of his claim.

It is inconceivable that appellees could believe that the insinuations made in the oral argument are sufficient to convict the appellant of incendiarism. It will immediately be apparent to this court that the only result hoped for by them is that the minds of this court will be prejudiced against the appellant. We are confident that this court cannot be misled by this obvious attempt to prejudice it, and will consider this matter upon the record.

In this reply brief we will consider the following matters:

1. *Reply to appellees' statements upon oral argument.*

2. *Reply to statements made in each of appellees' briefs.*

3. *Further consideration of the law and question of false swearing.*

CONSIDERING THE MATTERS RELIED UPON BY APPELLEES UPON ORAL ARGUMENT.

The appellees upon the oral argument dwelt upon the following:

(a) They insinuated incendiarism by plaintiff.

(b) They dwelt on exhibit of the second floor.

(c) Charged fraudulent manipulation of accounts.

(d) Claimed Colbert transaction showed appraisal failure fault of plaintiff.

We consider each of the said matters referred to in the oral argument briefly in the order stated.

REPLYING TO INSINUATIONS OF INCENDIARISM AGAINST APPELLANT.

The Supreme Court of California has held that in the absence of a direct issue, it is improper for a jury to consider the incendiarism by the insured, even though the evidence has been admitted without objection.

Capuro v. The Builders Ins. Co., 39 Cal. 123.

See also:

Morley v. Liverpool, 52 N. W. 939 (Mich.).

We believe that it is just as improper for this court or the lower court to consider the question of incendiarism where there is no issue made, as it would be for a jury to consider it.

As previously stated, the insinuations of incendiarism against appellant are definitely and obviously an attempt to prejudice this court *in limine,* and should be so regarded. Although the trial court states that it was not claimed, and was not an issue in the case, that plaintiff set the fire or had guilty knowledge of the incendiarism (V. I, p. 179), the appellees have come into this court and tried to fix in its mind that the appellant may have set this fire. Such insinua-

tions are easy to make, are extremely prejudicial, and the individual attacked is helpless in his own defense. We state in reply thereto that to one who is personally acquainted with appellant, they are utterly ridiculous and inconsistent with his character. Second, they are entirely inconsistent with his position and financial situation and the condition of his business at the time of the fire. We refer to the following facts in the record.

First. While appellant was in the factory on the afternoon preceding the fire, he was not the last known person there. Miss Georgia Mitchell, the superintendent of the factory, was in fact the last person known to be in the building prior to the fire. Just before leaving the building she carried out her regular duty of going through the whole building, seeing that the windows were closed and locked, and the doors were closed. (V. II, p. 586; V. VI, p. 3106.)

At the time of the fire appellant's business was thriving; he was employing approximately 100 people. (V. VI, pp. 3109 to 3111.) In the nineteen days preceding the fire he shipped on the average of over 80,000 bags per day, of a value of almost $8000.00 per day. (V. III, p. 1666.) They were working to capacity. (V. II, p. 611.) Some of the employees were working nights during the week of the fire. (V. II, pp. 776; 810-11.)

In the year 1928 appellant's sales amounted to $2,129,368.75. (V. I, p. 247.) His sales for the year 1929 up to the day of the fire amounted to $1,349,-195.60. (V. I, p. 248.) He had on hand a large number of orders for delivery in October following the

fire. (V. III, pp. 1453 to 1455.) His inventory was reduced from $533,631.50 on May 31, 1929 (V. I, pp. 260, 261) to $287,418.75 on September 30, 1929 (V. III, p. 1400), or to $196,621.21 if we adopt the figures calculated by Hood & Strong on October 19, 1929 (V. I, p. 251), or to $153,056.26 (V. III, p. 1667) as shown by the general ledger on October 19, 1929.

On June 1, 1929, the total insurance carried by appellant on inventory was $541,637.50. (V. III, pp. 1609-10.) This did not include use and occupancy insurance or insurance on machinery, which the judge states in his opinion he was unable to say was excessive. (V. I, p. 179.) It is apparent from the record that appellant's business had continued for a number of years. Mr. Taylor states that he had been employed for about 13 years (V. III, p. 1297), and in charge of the insurance since 1919. (V. III, p. 1413.)

We have elsewhere shown that appellant did not know the amount of insurance carried by him on the day of the fire (V. I, p. 533), and that according to the testimony of an insurance expert, the fact that his stock was fluctuating and was over insured was of no significance. (V. III, pp. 1152 and 1154.)

The fact that coal oil was found in the factory and may have been used in connection with incendiarism is absolutely of no significance against appellant. A large quantity of coal oil was always kept in the factory for use in cleaning the printing rolls, and there were other drums of various qualities of oil kept on the third floor for the printing department. (V. II, p. 566; V. IV, p. 1943.) The presses and mixing table were washed off every night with rags dipped in kero-

scene. (V. II, pp. 641-2; 816-17.) An odor of coal oil was always present.

Considering the whole matter of insurance and the inventory as it existed at the time of and prior to the fire; and considering the thriving business of appellant, absolutely no reason has been shown why appellant should desire a fire. If appellant had desired a fire, his stock was $533,000.00 and his insurance on stock was $541,000.00 on May 31st, then a fire might have been advantageous. It is obvious that appellant could only lose by a fire on October 19, 1929, a business which he had taken years to develop, and any insurance he had would be insufficient to compensate him therefor. To even insinuate that appellant was guilty of this incendiarism is merely an attempt to prejudice this court and assassinate the character of a defenseless litigant. The conduct of the appellees in this regard deserves the censure of this court.

The decision of the trial court, which it makes its absolute findings, amounts, so far as the business and personal reputation of appellant is concerned, to the equivalent of trial without information and conviction without indictment. It is foreign to our jurisprudence. "He who steals my purse steals trash, but he who takes my good name robs me of all that I possess"; "a good name is rather to be chosen than great riches". Such a practice is arbitrary, and the fact that it affects an individual person only, in a matter of insurance contract does not decrease its obnoxiousness. If it may be applied to one, it may be applied to all. If a man may be despoiled of both his purse and his good name by findings based on suspicion, in-

ference and indirection, he is indeed helpless, and he may, by argumentative indirection, and upon an issue not made in the pleadings, stand convicted before the business and social community in which he and his family live and in which he gains his livelihood, without that great constitutional guarantee of presentment or indictment of a grand jury. As the Supreme Court said:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. * * * It is the duty of the courts to be watchful of the constitutional rights of the citizens, and against any stealthy encroachments thereon."
>
> *Boyd v. United States,* 116 U. S. 616, 29 L. Ed. 746.

REPLYING TO APPELLEES' ORAL ARGUMENT CONCERNING STOCK ON SECOND FLOOR.

Appellees dwelt at great length in their oral argument on the exhibit of the second floor of the factory overflowing with merchandise which they claimed plaintiff had stated was there, but which could not be placed on said floor. In reply to a question of his honor, Judge Denman, Mr. Thornton stated that appellant had positively testified that the quantity of merchandise as indicated by the exhibit, was on the second floor at the time of the fire. We are glad that this matter was brought up, for it demonstrates conclusively, we believe, the unfairness of appellees toward appellant which has existed in every phase of this case.

In reference to the second floor of the factory appellant in this trial testified:

> "I did not visit the second floor Saturday afternoon" (the day of the fire.) (V. I, pp. 486, 448-9.)

That he did not know exactly or approximately, how many bags or how much baled burlap was on the second floor at the time of the fire (V. I, p. 487); that at the hearing on use and occupancy insurance he gave the testimony appearing at V. I, pp. 488-9 of the transcript (V. I, pp. 488-9); this testimony was (V. I, p. 488): "We had *probably* a half million bags * * *"; "We had *probably* two or three hundred thousand yards of baled burlap * * *" and "We had *probably* 100,000 to 150,000 yards * * *" etc. (italics ours) and the statement concludes: "That floor was quite well filled with merchandise." Now, when the foregoing testimony on the Use and Occupancy hearing was read on this trial, appellant testified: "That was always the case, Mr. Thornton; that is where all the material was opened." (V. I, p. 489.)

It is obvious to any one that this last statement of appellant referred only to the next preceding sentence, which was "That floor was quite well filled with merchandise." Yet appellees assumed this was a positive statement as to the quantity of merchandise on the second floor at the time of the fire, and built up their exhibit accordingly. We may assume that appellant's probabilities were ridiculous, but they are not more ridiculous than the attempt of appellees to charge them against him as positive statements of fact.

The testimony above referred to given at the Use and Occupancy hearing should also be considered in

the light of the testimony which immediately preceded it at the Use and Occupancy hearing. Appellant was asked on that hearing to state about how much goods was on hand which had to be moved following the fire.

"Approximately, from memory now?"

His answer was *"Roughly* $100,000.00 worth of goods."

He was asked to "Describe the bulk, so that the appraisers and umpire will get a picture of just what had to be taken out of the building before the repair work could start." (V. II, pp. 562-3.)

Appellant then gave the testimony including the *"probable"* quantities on the second floor which seems to be one of the principal supports of appellees in this case, and which, in view of the circumstance that appellant claimed no accurate knowledge, and was asked to approximate, and specifically did approximate, should have no weight.

We may conclude this matter by stating that appellees have not had the temerity to present this matter at all in their briefs, where its weakness would be readily apparent; but they attempted to present it only on oral argument to give the court an erroneous first impression in its consideration of this case.

FURTHER CONSIDERING THE FAILURE OF APPRAISAL WITH REFERENCE TO TRANSACTIONS BETWEEN APPELLANT AND COLBERT.

Appellees in their oral argument also laid great stress on the fact that appellant had loaned Colbert

money and permitted him to repay it by allowances on transactions between appellant and H. M. Newhall Co., for whom Colbert worked, and that Colbert appeared on appellant's payroll for the month of September preceding the fire for the sum of $250.00; and that Colbert testified that he arranged some fictitious contracts with appellant after the fire.

The testimony as to the alleged fictitious contracts was considered as showing other fraudulent conduct of appellant; the testimony of the payments to Colbert was considered as showing that the failure of the appraisal was due to Colbert and appellant.

The question of fictitious contracts is wholly collateral.

We wish to make it clear to the court that these alleged fictitious contracts formed no part of or basis of appellant's claim in the case at bar. In a claim on Use and Occupancy insurance, not involved herein, said contracts were an item of appellant's evidence. No charge was there made that they were fraudulent or invalid in any respect.

However, in this subsequent and collateral proceeding it is claimed that these contracts were fictitious.

The overwhelming weight of the evidence is that there were no fictitious contracts.

The weight of the evidence is that these contracts (six in number) were genuine. The evidence is as follows:

These six contracts were numbered and dated as follows:

No. 1449	June 20, 1929
1541	July 6, 1929
1542	July 6, 1929
1578	July 26, 1929
1593	Aug. 9, 1929
1602	Aug. 20, 1929

(Defendant's Exhibit HH, V. III, p. 1680.)

These contracts called for material to be delivered to appellant in the months of October and November, 1929, following the fire.

There is a letter in evidence, dated October 22, 1929 (Plaintiff's Exhibit No. 119; V. IV, pp. 1771-3), from Hyland Bag Company to H. M. Newhall Co. in which appellant stated the following:

> "Referring to conversation of yesterday, we have concluded, it undoubtedly will not be possible for us to get our factory in efficient running order before the first of the year and perhaps not until the end of January, so in line with our discussion, we have decided it will be best to sell the early arrival burlaps purchased from you and we therefore ask you to dispose of:"

Then follows the list of the six contracts claimed to be fictitious, and the letter then continues:

> "In regard to various other purchases from your firm covering goods arriving after February first, wish to advise that we do not want to sell these as we will have our factory in running order by the time these burlaps start to arrive—according to our records we have coming from you in addition to the above, as follows:"

Then follows a list of ten contracts for shipment in December 1929, and thereafter. *Each of these ten contracts is conceded by appellees to be genuine.*

The letter then concludes:

> "As you can readily understand, the fire will naturally result in a serious loss to us, for the reason, that although we are covered by insurance, we will lose many valuable customers, who will be forced to go to other bag factories for their supplies while we are down, so we therefore ask you to make every possible effort to sell the six lots of goods without loss to us and we thank you in anticipation of your doing so.
>
> Assuring you, we will appreciate your full cooperation—especially under the circumstances—we await your advices.
>
> Very truly yours,
> Hyland Bag Company,
> (Signed) Richard C. Hyland.
>
> RCH/M"

Mr. Colbert testified that the original of this letter was handed to him, but he didn't know the date, that he didn't put it in the Newhall records but destroyed it. (V. IV, p. 1774.) He remembered calling with Mr. Geo. Newhall upon appellant, he thought the morning after the fire. (V. IV, p. 1777.) That there might have been a discussion of the possibility that they might be able "to defer some shipments or to divert some shipments to assist Mr. Hyland in his predicament at having a fire". (V. IV, pp. 1778-9.)

That the request contained in Mr. Hyland's letter would be perfectly in order if the contracts were valid. (V. IV, pp. 1779-80.)

That Mr. Hyland did not ask him to secrete or destroy the letter. (Plaintiff's Exhibit 119; V. IV, p. 1771.)

That if there were any numbers on the contracts Mr. Hyland selected the numbers. He made out the contracts in his office. (V. IV, p. 1794.) However, Almer Mayo Newhall showed in his testimony that the number of each and every one of these contracts was a Newhall number, though none of the Newhall contracts bearing these numbers were with Hyland Bag Company. (V. IV, pp. 2080-2081.)

As to the alleged fictitious contracts Mr. Hyland testified:

> "I did not, at any time after the fire, or before the fire, ask Mr. Colbert to have certain contracts prepared which could be cancelled, and particularly after the fire, upon which I could predicate the value at which goods could be replaced in making up a proof of loss.
>
> Mr. Colbert did not, at any time, furnish me with blanks of H. M. Newell & Company contracts to make up any contracts for the purpose of submitting them thereafter to Colbert for the checking of prices, or for any other purpose.
>
> I did not at any time have either in my possession or under my control, either at my factory, or at my home, or at any other office or place, any typewriting machine that had type or that employed a ribbon with ink of the character as shown on the insert appearing in Plaintiff's Exhibit No. 136, or of the character of the type as shown in the letter which has been marked 'Plaintiff's Exhibit No. 135; I never have had such a typewriter.

Mr. Schmulowitz. Q. Mr. Hyland, have you personally seen the contracts which have been designated by the numbers 1449, 1541, 1542, 1578, 1593 and 1602?

A. I assume those to be the six contracts?

Q. The six contracts in dispute.

A. Yes, I have seen them."

(V. VI, pp. 3230-3231.)

And again:

"I first saw those contracts in my office. They came in through the mail at various times, they were presented to me after being checked up by Miss Mitchell for my signature. I do not recall at this time by whom they were signed on behalf of H. M. Newhall & Co.

I positively did not fill out any of those contracts. I positively did not cause any of these contracts to be filled out by anybody in my employ, or specifically employ anyone to fill out any of these contracts. Never at any time did I assign numbers to any H. M. Newhall & Co. contracts in my possession at any time. These contracts, except for the signature line in the lower left-hand corner, as shown on Plaintiff's Exhibit 136, were complete. On the various occasions when these contracts came in, I completed these contracts by affixing my signature. These particular contracts positively were not received by me at all at one time after the fire. I at all times believed them to be valid contracts."

(V. VI, pp. 3231 and 3232.)

Miss Georgia Mitchell, factory superintendent, testified in reference to these contracts:

That she saw them; that they came in through the mail; that she kept a record of all contracts and had done so since 1921, and that these contracts appeared upon her record which was put in evidence as Plaintiff's Exhibit No. 154. (V. VI, pp. 3099-3101.) Her testimony was as follows:

> "Whenever a contract, a purchase contract, is made, I listed it in a numerical file which I kept, just for my own use, it was not anything in particular, just to show the number of the contract, to keep a record of it, show who they were purchased from; whenever a contract was received, I gave it a number with a numerical numbering machine, and listed it under this number, and then, if the prices, the quantity, and the terms were correct, I took it in for Mr. Hyland's signature, which I did with every one of these; they did not all come in at one time, they were not all mailed back at one time.
>
> The series of sheets, consisting of thirteen pages which you hand to me with the request that I state when I handed those sheets to you for the first time: I brought them to you at your home on December 1, in the evening, after I had heard of the testimony of Mr. Colbert. They represent a list of our purchase contracts which I started in 1921 and kept up to the present time, and I brought them to you to show you where I had listed these contracts as they came in. As to, what entries I made on these sheets and what data I recorded on these sheets; well, the contract number, I had put in with pen and ink, because the numeral numbering machine I used for numbering the purchase contracts was a single numbering machine, and then after the contract

number, I put the kind of burlap, and the amount, that would be yardage, and letter of credit number, if it were a purchase in Sterling, and if it were a purchase in Dollars and cents, then I used the purchase contract number; I put in the cost, who it was from, and the mill, if it was to be a special mill shipment, and then after it arrived, the stock number that was given to that particular lot, and crossed it off as being completed.

Yes, I started that in 1921. These are all the sheets in Mr. Hyland's office from the time that I started it down to and including the last record that was made. The last record made on these sheets was prior to December 1, 1931, because I have not had it in my possession since then, but it was prior to that, I don't know just when. Yes, in other words, it records transactions up to on or about the date when I brought the sheets to your home.

Finding for you the sheets among these upon which there is any reference to contract numbers 1449, 1541, 1542, 1578, 1593 and 1602: they are here on this sheet. This sheet has the number '19' in the upper left-hand corner, yes, that was my number, the 19th sheet. Yes, I placed that number upon that sheet at your request. As for the red crayon marks upon the sheet: I placed these check marks there at the time that the letter was written cancelling these contracts; I had to complete my file some way, so I put a red crayon mark and wrote the word in 'Cancelled, See R. C. H.', because the letter was by Mr. Hyland, and it would have gone back to the H. M. New-

hall Company file, so I was referring to it in that way."

(V. VI, pp. 3099-3102.)

See also:

(V. VI, pp. 3131-2; 3134-9.)

She further testified that she typed the letter (Plaintiff's Exhibit 119), that she believed that it was October 22, 1929, that she believed she mailed it, that the occurrence was within a day or two after the fire. (V. VI, pp. 3102-3.) The first she had heard about any fictitious contracts was when Mr. Colbert made the statement in court. (V. VI, p. 3104.)

Mr. Almer Mayo Newhall testified that his firm used a typewriter with a special type and a special colored ribbon. (V. IV, p. 2122.) Miss Mitchell stated that Mr. Hyland never had any such machine. (V. VI, pp. 3103-4.)

Mr. R. L. Rowley testified that he saw the alleged fictitious contracts and that as to type and color of ink they were not different from the ordinary Newhall contracts. (V. VI, p. 3282.)

Mr. D. A. Parker testified that he saw these contracts (V. VI, p. 1681), and that they were not different from the ordinary Newhall contracts. (V. VI, pp. 3311-12.)

We believe it is significant that there was no testimony introduced that Newhall & Co. did not receive material such as was called for by these alleged fictitious contracts, and likewise it is significant that they would not permit appellant's accountant to make a

general examination of their records. (V. VI, pp. 3310-11.) Colbert when first on the stand testified he believed there was some contract cancelled. (V. III, p. 1295.)

As against all this evidence tending to show that the contracts were genuine, there is only the later testimony of Colbert that they were fictitious, and the testimony of Mr. Newhall that the Newhall Company records showed that the Newhall Company contracts bearing the numbers referred to were with other persons and none of them were with the Hyland Bag Company.

The circumstances of Colbert's testimony that the contracts were fictitious make his testimony of little weight:

The night previous to testifying that the contracts were fictitious he stayed at the home of Mr. George A. Newhall, Jr. (an avowed enemy of plaintiff) at the request of Mr. Newhall, and he discussed his testimony with Mr. Newhall and came to the court at the request of Mr. Newhall without subpoena. (V. IV, p. 1754.) He was asked if he had been threatened with arrest on any criminal charge, and stated "There was intimation that there might be, there was no threat". (V. IV, p. 1755.)

Almer Mayo Newhall testified:

> "When Mr. Colbert stated in court a few days ago that there were intimations made to him of possible criminal charges, he told the truth. I am telling the truth, I did not do it. Yes, it was done in my presence. Yes, intimations of criminal conduct were made in my presence to Mr.

> Colbert. By Judge Zook. My cousin was present. My cousin participated in some of the conversation, I think so."

Considering the whole testimony as to the alleged fictitious contracts, the overwhelming weight is that they were genuine. The only direct evidence to the contrary is the testimony of Mr. Colbert, who was testifying under intimation of criminal prosecution.

But whether fictitious or valid, the question of these contracts was evidentiary matter, and collateral to any issue in this case. The contracts, even if fictitious and fraudulent, did not tend to perpetrate any wrong or inflict any injury upon the defendants in this case, raised no equity in their favor and constituted no defense herein.

The gratuities to Mr. Colbert.

Defendant's Exhibit JJ (V. IV, p. 1729) shows that on November 19, 1928, Mr. Colbert executed a note to appellant for the sum of $300.00. It appears elsewhere in the evidence that this represented a loan. On July 25, 1929, this loan, with interest, was paid by the allowance of a commission on Newhall contract No. 1194 in the sum of $75.00, by the allowance of a commission on Newhall contract No. 1147 in the sum of $262.50, by the allowance of the sum of $110.00 as a part of a $300.00 credit memorandum on inferior burlap received from Newhall & Co., and a balance of $127.17 was paid to Mr. Colbert by check. This journal entry was approved by appellant by his own signature.

It also appears that in the month of September, 1929, the name of Mr. Colbert appeared on the payroll account of appellant for the sum of $250.00. The exact date that Mr. Colbert received the money does not appear. Mr. Taylor testified that he understood the money was a loan and that it was put through the payroll account out of consideration for the feelings of Mr. Colbert. (V. VI, pp. 3181-2.) Mr. Colbert was never an employee of Mr. Hyland. (Testimony of Taylor, V. VI, p. 3182; Colbert, V. III, p. 1291.)

The gratuities not secret or criminal.

That Colbert received the gratuities from Mr. Hyland is unquestioned. The commissions were simply an easy way of wiping off Colbert's obligation.

Mr. Colbert testified that the intimations of criminal prosecution made against him by the Newhalls. were not based upon the receipt of these commissions.

> "No, it was not in association with these commissions that the statement or intimation was made to me that I might be the subject of criminal charges, because there is no criminal connection with accepting a commission."
>
> (V. IV, p. 1790, Colbert's Testimony.)

Mr. Hyland was among the best of customers of Newhall & Company. (V. IV, p. 2114.) Mr. Hyland had loaned Mr. Almer Mayo Newhall $35,000.00 at one time. (V. IV, p. 2111.)

There was nothing secret about the allowance from Mr. Hyland to Mr. Colbert. They were set forth in

his books. If these allowances were for some evil purpose, it is more likely they would have been paid in cash out in the alley behind O'Leary's barber shop instead of being set forth on appellant's books.

Whether these gratuities were or were not ethical so far as Newhall & Co. are concerned, is not in issue here. The Newhalls did not consider it was unethical or criminal to borrow both money and burlap from Hyland. However, we do say that it is not apparent that Newhall & Co. ever suffered in the slightest from the friendly relations between Mr. Colbert and Mr. Hyland. The one instance in which he thought he might have made a loss by the cancellation of a contract prior to the fire (V. IV, p. 2097) was never in fact a contract at all. (V. VI, pp. 3115-3121.) Mr. Hyland purchased millions of yards of burlap from Newhall & Company.

Failure of appraisal not attributable to acts of appellant.

The question is, what relations have these facts to the issues in this case?

The allegation in the answer of some of defendants to which they claim these facts are related is as follows:

> " 'If the insured and this company fail to agree, in whole or in part, as to the amount of loss within ten days after such notification, this company shall forthwith demand in writing an appraisement of the loss or part of loss as to which there is a disagreement and shall name a competent and disinterested appraiser, and the insured within five days after receipt of such demand and name, shall appoint a competent and disinterested ap-

praiser and notify the company thereof in writing, and the two so chosen shall before commencing the appraisement, select a competent and disinterested umpire.

The appraisers together shall estimate and appraise the loss or part of loss as to which there is a disagreement, stating separately the sound value and damage, and if they fail to agree they shall submit their differences to the umpire, and the award in writing duly verified of any two shall determine the amount or amounts of such loss.

The parties to the appraisement shall pay the appraisers respectively appointed by them and shall bear equally the expense of the appraisement and the charges of the umpire.

If for any reason not attributable to the insured, or to the appraiser appointed by him, an appraisement is not had and completed within ninety days after said preliminary proof of loss is received by this company, the insured is not to be prejudiced by the failure to make an appraisement, and may prove the amount of his loss in an action brought without such appraisement. * * *

Time for Commencement of Action. No suit or action on this policy for the recovery of any claim shall be sustained, until after full compliance by the insured with all of the foregoing requirements, nor unless begun within fifteen months next after the commencement of the fire.'

Defendants allege that they and the plaintiff failed to agree in whole or in part as to the amount of loss within the time provided in each of the policies, and that these defendants forth-

with demanded in writing an appraisement of the loss, and named a competent and disinterested appraiser, and the plaintiff within five days after receipt of such demand and name notified these defendants in writing of the appointment of an appraiser named by him. The appraisers so named did not agree upon the amount of loss or the sound value or the damage, and did not agree upon an umpire. The appraisement was not had due to the acts of the plaintiff and the appraiser appointed by him, and this action was commenced before compliance by the plaintiff with the provisions of each of said policies of insurance regarding the appraisement of the loss."

(V. I, pp. 48, 49 and 50.)

Competency and disinterestedness of Colbert not in issue.

Under the foregoing answer the competency and disinterestedness of the appraiser appointed by plaintiff is not put in issue. Such competency and disinterestedness is presumed. The contrary is not alleged, and hence cannot be claimed to be in issue.

Colbert was competent and disinterested.

But if competency and disinterestedness were in issue, the issue should be resolved against the appellees. Colbert was a man of years of experience in the burlap business, and hence was thoroughly competent.

Furthermore, Colbert was not financially interested in the outcome of the appraisement, and hence was disinterested within the meaning of the policy.

That he was friendly to plaintiff did not disqualify him. Undoubtedly these policies contemplate that

each party shall appoint someone friendly to his interest. The terms of the policy provide:

> "The parties to the appraisement shall pay the appraisers respectively appointed by them."

Thus the policy provides that the appraiser, in a limited sense at least, shall be the employee of the party appointing him.

The law has been stated thus:

> "The appraiser chosen by each party is supposed and expected in a restricted sense, to represent the party appointing him, and within reasonable limits to see to it that no legitimate consideration favorable to the party so appointing him is overlooked by the other appraiser."
>
> *Dennis v. Standard Fire Ins. Co.,* 107 Atl. 161, 162 (N. J. Eq.).

A very sensible statement in reference to this matter is found in the case of *Whalen v. Goldman,* 115 N. Y. S. 1006 at 1008:

> "The requirement of the policies of insurance is that the appraiser and the umpire should be disinterested. Such appraisers were not in the strict sense arbitrators, and it is not probable that either party to the policies contemplated, in case of loss, that the appraisers should stand absolutely unbiased. It is more than probable that each one selected an appraiser in whom confidence was reposed as an honest man, but that, in case of any difference, his sympathies would incline toward the party by whom he was chosen. It would be expecting too much, in the present stage of progress toward the millenium, to assume that either party contemplated, when entering into the con-

tract of insurance, that the appraisers selected should be absolutely indifferent."

Furthermore, if there was any claim that Mr. Colbert was not a disinterested appraiser, it was the duty of the defendants to have objected to him at the time.

Eaton v. Globe & Rutgers, 116 N. E. 540 (Mass.);

Doherty v. Phoenix Ins. Co., 112 N. E. 940 (Mass.);

26 *C. J.* 426.

It does not appear in the record that appellees have learned any fact which they were not aware of at the time the appraisement was attempted.

Mr. Colbert was not related to plaintiff.

It does not appear that he had formed any opinion on the loss.

It does not appear that he had any prejudice against defendants or in favor of plaintiff, or that he could not have fairly determined the loss.

In fact, he, himself, testified that he "would take no dictation from anybody, but the thing would be settled absolutely on business merits with Mr. Maris and the third party, whoever it might be." (V. III, p. 1291.)

Under the pleadings, then, we conclude that the competency and disinterestedness of Mr. Colbert as an appraiser were not in issue, but if they were in issue, under the facts, it should be held that he was competent and disinterested within the meaning of the policy.

As indicated above, some of defendants alleged that "the appraisement was not had due to the acts of plaintiff and the appraiser appointed by him" and etc.

Fault of appraiser is not fault of person appointing him. Appraisal not a condition precedent to action.

Under a proper construction of these policies here involved, any acts of the appraiser appointed by plaintiff which prevented appraisement are not a bar to plaintiff's action.

In the recent case of *Norwich Union Fire Ins. Soc. v. Cohn,* 68 F. (2) 42 (C. C. A. 10th), under a similar provision, the court upheld the refusal of the trial court to submit to the jury the question whether or not the appraisal failed because of the neglect of the appraiser for the insured. In this regard the court said:

> "Fault of an appraiser is therefore not the fault of the party appointing him."

The policies here involved have exactly the same ambiguity which was referred to in the foregoing case. *Our policies do not require appraisement as an absolute condition precedent to an action for the loss sustained.* Unless the appraisement is a condition precedent, action may be brought without appraisement. *(Hamilton v. Home Ins. Co.,* 137 U. S. 370.) The early California cases cited in the opinion of the court and in the briefs of counsel for appellees were rendered before the adoption of our standard form policies and they have been questioned and distinguished. (See *Winchester v. North British & Mercantile Ins. Co.,* 160 Cal. 1.) The provision for appraisement is for the

benefit of the insurer and must be strictly construed against the company.

"Any provisions of a fire insurance policy seeking to impair the right of the insured to resort to the courts must be strictly construed against the company."

Providence-Washington Ins. Co. v. Kennington, 71 So. 378, 380 (Miss.);

Joyce on Insurance (2nd Ed. V. V, p. 5406);

Winchester v. North British & Mercantile Ins. Co., 160 Cal. 1;

Western Assur. Co. v. Decker, 98 Fed. 381 (C. C. A. 8th);

Spring Gorden Ins. Co. v. Amusement Syndicate, 178 Fed. 519 (C. C. A. 8th).

It does not appear that insurers complied with policy.

Under our policies the insurance company must make the demand for the appraisement, and must *appoint a competent and disinterested appraiser,* before the insured is required to act at all. We might well question in this case whether the insurance companies fulfilled this requirement on their part, for they appointed Mr. Maris, who was regularly employed by the, and, under a number of authorities, not disinterested.

Bradshaw v. Agr. Ins. Co., 32 N. E. 1055 (N. Y.).

"It has been well said that an habitual appraiser is not a disinterested person within the meaning of the arbitration clause in insurance policies."

Hartford Fire Ins. Co. v. Asher, 100 S. W. 233, 234 (Ky.).

If the appraiser appointed by the insurer is not disinterested, or if neither of the appraisers appointed are disinterested, the insured may bring his action.

Hartford Fire Ins. Co. v. Asher, 100 S. W. 233, 234 (Ky.).

The defendants were required to affirmatively allege that they appointed a competent and disinterested appraiser in accordance with the policy as a part of their defense.

> "Non compliance with a condition of the policy making appraisal or arbitration of the amount of the loss a condition precedent to an action on the policy cannot be taken advantage of under the general issue or a general denial; it must be specially pleaded. And the plea must allege the existence of all conditions making an award essential to the maintenance of the action."
>
> 26 *C. J.* 502.

Under our pleading no replication is required, but the defendants' averments are deemed denied.

Equity Rule 31, 28 U. S. C. A. Sec. 723;

Arkansas v. Mississippi, 250 U. S. 39, 63 L. ed. 832.

This denial necessitated proof that the appraiser appointed by defendants was competent and disinterested. There is nothing in the record to show this. In fact, the inference is to the contrary. (V. III, p. 1284.) Maris, defendants' appraiser, was not produced on the trial. If appellees did not prove the appointment of a competent and disinterested appraiser, then they did not establish their defense for

it was incumbent on them to establish this before appellant was required to take any action at all under the policies involved here.

Compliance by the insured with the terms of the policy as to appointing an appraiser was required only after proper action by the insurer. He was not responsible any further. The evidence shows appellant complied with his requirements.

Appellant showed compliance.

He filed his proof of loss, he promptly appointed his appraiser, when required to do so. Thereafter it does not appear that he ever interfered in any particular with the appraisement, and hence it cannot be said that for any reason attributable to him the appraisal failed. Therefore, plaintiff had the right to bring his action.

Although fault of the appraiser is immaterial under the case of *Norwich Union Fire Ins. Soc. v. Cohn,* 68 F. (2) 42 (C. C. A. 10th) above referred to, nevertheless we refer to appellant's brief heretofore filed, pages 67-78 where it conclusively appears, we believe, that Mr. Colbert, appellant's appraiser, made every reasonable effort to agree upon an umpire, *even suggesting any Judge of the Superior Court.*

Loss payable ninety days after proofs of loss filed.

There is still another paragraph in the policy which we believe establishes the appellant's right to bring his action when he did, without regard to appraisement. This paragraph is as follows:

> "Loss When Payable. A loss hereunder shall be payable in thirty days after the amount thereof has been ascertained either by agreement or by appraisement; but if such ascertainment is not had or made within sixty days after the receipt by the company of the preliminary proof of loss, then the loss shall be payable in ninety days after such receipt."
>
> (V. I, p. 313.)

This seems like a definite provision, that without regard to appraisement, whether completed or not, the loss shall be payable in ninety days after the receipt of the preliminary proofs of loss. The preliminary proofs of loss were filed on December 24, and 26, 1929, the ninety days expired on March 25, 1930. Plaintiff's suit was commenced June 23, 1930.

Giving this "Loss Payable" paragraph the construction in favor of the insured and against the insurer, which the law requires, it appears that the loss is payable without regard to appraisement, and plaintiff rightfully brought his action.

Under any view which may be taken of the matter, the defense of the failure of appraisal cannot be sustained to bar appellant's action on these policies.

THE ALLEGED FRAUDULENT MANIPULATIONS OF RECORDS.

Because of the deep interest manifested by the court in the claim, on oral argument, of attorneys for appellees of the fraudulent manipulations of records, counsel for appellant have made a special study of the testimony concerning the books and records of appellant in this case, and after such study, state to the

court that they are entirely willing to rest the appellant's whole case upon the court's determination as to the merits of this claim.

Appellant's freedom from any charge of fraudulent manipulation of his records appears from the following facts:

First: There is not any claim or evidence in the record that appellant ever placed a figure in, or changed a figure in his books, or that he ever directed any one to change his books or place a false figure therein. Except for the approval of the gratuity to Colbert (V. IV, p. 1729), it is not even suggested in the evidence that appellant was ever consulted with reference to any entry in his books. Therefore, so far as any personal charge against appellant is concerned, there is absolutely no basis for any claim of any fraudulent alteration or manipulation of records.

Second: Appellant's claim as set forth in his proof of loss was based upon the first report of Hood and Strong, Plaintiff's Exhibit No. 1. (V. I, pp. 246 to 248.) As to this claim it is admitted that the basis of the calculation was the book inventory of December 31, 1928, which was in the amount of $171,614.36, as testified to by accountant for appellees, after deducting an adjustment of approximately $20,000; "In other words the book inventory as of December 31, 1928, before the adjustment, would be greater than this sum of $171,614.36 to the extent of that adjustment, or somewhere around $191,000.00. That is correct. This figure of $171,614.36 does also represent the physical inventory as of December 31, 1928." (V. V,

p. 2373. Testimony of Leonard Albert Hart, *accountant for appellees.)*

It is obvious, therefore, that even appellees can have no basis of criticism as to the starting point of the calculations made by Hood & Strong to arrive at the apparent inventory as set forth in their first report.

Nor is there claimed in the basis for this report any manipulation of records. The report of Hood & Strong includes their entire calculation, and it is not asserted anywhere that any of their figures are incorrect. We may pass on, I believe, therefore, and assume that there is no fraudulent manipulation of the records claimed in reference to the Hood & Strong report or the proof of loss.

Third: The record in reference to the claim set forth in the amended complaint:

Mr. Hart, the accountant for appellees, sets forth in his testimony that he is familiar with the methods adopted by Hood & Strong in their two reports, including Plaintiff's Exhibit No. 2, which was the basis of plaintiff's claim in his amended complaint. (Testimony of Hart, V. IV, p. 2301.) (Report V. I, p. 248 et seq.) He stated the method as follows:

> "Hood & Strong for their purpose have started with an inventory taken as of May 31, 1929, as per report of Ernst & Ernst, $533,631.50. To this figure they have added the purchases and various charges, customs charges, labor, insurance, cartage and trucking, freight, bank charges on letters of credit, State toll, and * * * from the aggregate of all these figures have deducted the total cost of sales for the period of June 1, 1929

to October 19, 1929, thereby arriving at an apparent inventory at all locations on October 19, 1929; and they have deducted from this apparent (inventory) at all locations, the inventory of October 19, 1929 at other locations, arriving thereby at the apparent inventory at Sacramento Street of $132,947.44."

(Testimony of Hart, V. IV, p. 2302.)

Mr. Hart further testified:

"When we go in and make an audit of the books and records of a concern for the purpose of arriving at an inventory, if we find from the examination of the records that a certified inventory and report has been made by a firm of accountants of standing, ordinarily we probably would accept their certification as the starting point for our work, so that if Hood & Strong, in the preparation of the report for submission either to a client or to a court, started in this case with the certified report and inventory as prepared by Ernst & Ernst, that would be in line with what our own practice would have been under similar circumstances—in line with all sound accounting practice."

(V. IV, pp. 2348-49.)

Again Mr. Hart stated:

"I can only answer that in one way, we did investigate certain entries upon the books of the Hyland Bag Company, but we had knowledge of other investigations that had been made by various accountants, such as Lybrand, Ross Bros. & Montgomery, of whose report I have seen at least, as I recall, four or five, there have been in-

vestigations made by Ernst & Ernst, by Hood & Strong, of whose reports I have seen three, and I have no reason, myself, personally, to doubt that when they make a statement that they have audited the purchases, for instance, that they audit them, I am perfectly willing to take their word for it.

Q. If you find in their report that they have audited purchases and sales, you are willing to accept their assurance of the integrity of those purchases and sales?

A. In so far as the integrity, yes, but not in so far as possibly their method of calculation of costs.

Q. The matters upon which you are not willing to accept the conclusion of other accountants are matters that involve accounting costs and controversial problems?

A. No, they are not.

Q. You are willing to accept their conclusions upon the integrity of the transactions, themselves?

A. I think that they have all done fairly, fairly done their work, fairly well, so far as I know."

From this testimony it appears that the starting point for the Hood & Strong calculations on their second report, which was the basis of appellant's amended complaint, is perfectly proper, and would not be questioned by any good accountant.

Having the certified inventory of Ernst & Ernst of May 31, 1929, then as the starting point, the only possible sources of error would be:

(a) To go back of that inventory and show that something was included therein which should not have been included.

(b) To show that something was included therein and afterwards added in again by Hood & Strong.

(c) Error in calculation.

Under the foregoing headings the appellees claimed that the following items should have been deducted, to-wit: $22,737.12, $7725.00, $9199.13, $300.00 and $1400.00, or a total of $41,361.25. (V. IV, p. 2316.) The items of $9,199.13 and $1400.00 were claimed as erroneous additions in the total inventory of Ernst & Ernst. The items of $22,737.12 and $7725.00 were claimed to be duplications; that is, merchandise counted by Ernst & Ernst and again included by Hood & Strong in their audit. The item of $300.00 is an item of rebate which was erroneously included by Hood & Strong in the value of merchandise sold.

We discuss each of the foregoing items separately.

(1) The item of $9199.13.

It appears from Defendants' Exhibit M (V. II, p. 896) that in arriving at the total inventory of $533,631.50, Ernst & Ernst, in their calculations included the following adjustment No. 22:

"Adjusted overhead applicable to inventory of finished bags $9199.13"

Just preceding this adjustment, however, Ernst & Ernst had made adjustment No. 21 which was a reduction as follows:

"Reversing overhead recorded by the Company preparatory to the following adjustment $15,630.02"

It will be seen, therefore, that Ernst & Ernst, first deducted an overhead of $15,630.02, and then added on an overhead of $9199.13, which they deemed was applicable to the finished bags on hand. It might be said in this regard that it appears that the finished bags on hand amounted to $349,881.23. Hence the overhead included amounted to only 2.64% of the total cost. Whether or not such deduction should be made is purely a problem in accounting. The item was included in the Ernst & Ernst inventory, made a considerable length of time before the fire, and hence had absolutely no relation to the claim of appellant in this case. Even the accountant for the appellees states that he considers the work of the accountants was fairly done. It would seem, therefore, proper to assume that the item was properly included by Ernst & Ernst in their inventory.

The testimony of Mr. Parker, one of appellant's accountants, states:

> "It is correct and accepted accounting practice to include in the cost of manufactured goods the cost of raw material, including in-freight, marine insurance, cartage and trucking and any other expenses incidental to landing the raw material at the factory; in addition to this must be added labor, royalties on patents, depreciation (in this case on machinery), rental of plant, and all other expenses such as heat, light and water, which are incidental to the operation of the plant."

> "Ernst & Ernst, in arriving at the valuation of the inventory as of May 31, 1929 observed these principles and included in the cost of 2,843,899 manufactured bags an item of $9199.13, as representing all manufacturing costs applicable to those manufactured bags other than the cost of the raw material and direct labor. This item represented the very conservative overhead cost of $3.25 per thousand manufactured bags."
>
> (V. VI, p. 3353 and 54.)

It is to be noted that Hood & Strong, in arriving at their apparent inventory of October 19, 1929, amounting to $132,947.44, did not include any factory overhead for the period from the date of the Ernst & Ernst inventory to October 19, 1929, and it is stated that this was at the request of Mr. Hyland. Otherwise it would have been proper for them to have included such overhead. (V. VI, p. 3354; V. I, p. 250.)

It would seem, therefore, that the item of $9199.13 was properly included, but in any event no charge of any impropriety can be attributed because it was included in any claim of appellant.

(2) As to the item of $1400.00.

The accountant for appellees also claims that there should be a deduction of $1400.00 for the following reasons. It appeared that on the inventory at the Sansome Street Warehouse on October 21, 1929, there were 68,000 grain bags under Lot No. 521, and under the heading "1928 Remainder". In this connection the statement of an accountant for appellees was as follows:

"Yes, there is one other reduction: we found from an examination of the Hood & Strong report that there were 68,000 bags, finished bags, grain bags, on hand in the Sansome street inventory on October 19, 1929. From the description placed upon the inventory sheets, it is apparent that these bags have been brought over as a remainder from the 1928 inventory, they are marked '1928 remainder' at the top of this sheet, which I believe has been produced here as an exhibit. If that is the case and these bags that appear in the October 19, 1929 inventory have been brought over from 1928 inventory, it is apparent that they must be included in the May 31, 1929 inventory as taken by Ernst & Ernst, and it is therefore apparent that the unit cost used at October 19, 1929, should be on the same basis as they appear in the Ernst & Ernst inventory as of May 31, 1929. Making a difference of approximately $1400."

(V. IV, pp. 2315-16.)

It was the testimony of Mr. Taylor that this description of these grain bags was erroneous, and that all bags under Lot 521 had been sold. (V. VI, pp. 3190 and 3201.)

Mr. Taylor testified:

"Since Mr. Hart testified, my attention was directed to certain testimony that he gave upon an item of 68,000 grain bags that appeared in the inventory at Sansome street immediately after the fire. At the top of the third page of this summary which has been marked Defendants' Exhibit J, I find a notation in pencil, '1928 remainder.' That was made by me personally. It is not a cor-

rect statement. I have three infallible proofs that that is not correct, that it was an assumption on my part, and should not have been there. The first is Journal Entry 4601. That journal entry has been referred to, but not offered in evidence. Journal Entry 4601 which you show me came from the records of the Hyland Bag Company. That Journal Entry has been inspected and examined by Mr. Hart. On the reverse side of this Journal Entry is a work sheet or memorandum; that work sheet or memorandum was on the reverse side of that Journal Entry when Mr. Hart examined it."

(V. VI, p. 3190.)

"Now, proceeding with my explanation as to why the entry appearing on the October 21, 1929 inventory is an erroneous entry: first is Journal Entry No. 4601, adjusting the under-estimate cost figures during 1928. The fifth item on the small piece of paper on the back reads: $9120.56. That is the difference between the cost of materials $554,613.56 and the estimated cost of sales of $545,493, as it appears on the stock sheet 521—the difference is $9120.56. That $9120.56 wiped the 1928 job off the books entirely. By this entry here being included $20,734.89, there were no more bags, and we closed the account. The next corroboration is the Rosslow inventory of May 31, 1929. There are no bags in 1928, the only ones being 559 of the 1929 manufacture. The other corroboration is the inventory of December 31, 1928, page No. 5, the detail list of all of the accounts used in closing out the domestic $10,488.74. The only domestic bags mentioned are three bales

of green bags that had been left over for several years in our job No. 534. So there were no 1928 grain bags on hand at that time."

(V. VI, p. 3201.)

"In addition to matters heretofore disclosed by me, I have other matters to which I can refer in aiding me to identify the 68,000 patched and darned bags as belonging to Lot 559 of 1929 manufacture, rather than Lot No. 521 of 1928 manufacture. These patched and darned bags were all made from a lot of inferior material we received from the Ludlow Manufacturing Company. It ran into quite a vast volume of poor cloth, it ran into a claim of many thousands of dollars, with which Cerf & Cooper are very familiar, and understand the whole detail of. That inferior material was received commencing with January 1929. That is an additional circumstance that allocates that to 1929, absolutely."

(V. VI, p. 3222.)

In view of the foregoing testimony it would seem that the claim of the accountant for the appellees is based upon a mistake and that this item of $1400.00 should not properly be deducted. The whole basis of appellees' account's claim was the assumption that the 68,000 bags referred to were carried over from 1928. He was misled in this regard by Mr. Taylor's error in describing them as 1928 remainder. We believe that Mr. Taylor satisfactorily explains his error. Hence this deduction should not be made.

(3) As to the item of $22,737.12.

The appellees claim that there was a duplication in reference to this item; that the item represents 150 bales of merchandise which was counted in the certified Ernst & Ernst inventory of May 31, 1929, and that it was included by Hood & Strong in their audit as a purchase subsequent to May 31st and prior to October 19, 1929.

The testimony of Mr. Hart showing the position of appellees is as follows:

> "Q. Now, Mr. Hart, I call your attention to Defendants' Exhibit M, and I call your attention particularly to an item appearing on Defendants' Exhibit M—that is Mr. Rosslow's work sheet, for your information, of Ernst & Ernst—of $22,737.12, and ask you if you have made a study of that item, or a purchase represented by that item?
>
> A. I have.
>
> Q. What does that item represent in the way of burlap, Mr. Hart?
>
> A. Those items represent 150 bales, 300,000 yards of 37-10 burlap.
>
> Q. Now, did you find, Mr. Hart, that that item of that particular shipment of 300,000 yards or 150 bales was included by Mr. Rosslow and duplicated by Hood & Strong as a purchase subsequent to May 31, 1929?"

With realization that the burden of proof is on plaintiff-appellant to prove the loss on this item of $22,737.12, we say frankly that there is a conflict of testimony on this item. If it is a duplication, appellant is not entitled to it and desires no benefit therefrom. As will hereinafter appear, it could not be definitely de-

termined by Ernst & Ernst or Hood & Strong, or Mr. Taylor, or Mr. Parker, that it was a duplication, but on the other hand it could not be established certainly that it was not a duplication. The accountants put in much time and study concerning it. Whether it is a duplication or not has no bearing upon the question of false swearing, for it is an accountant's error, but if the court finds that it is a duplication the claim in appellant's amended complaint should be reduced in this amount.

The facts are these:

The work sheet of Ernst & Ernst showing computations and reconciliations of ledger inventory and actual inventory of May 31, 1929, shows adjustment No. 20, material on hand but not inventoried, Lot 2199, H. M. Newhall, $22,737.12. (V. II, p. 896, Defendants' Exhibit M.) This adjustment is also shown as inventory on dock. (V. III, p. 1356, Defendants' Exhibit L.)

A portion of the work sheet of Ernst & Ernst in reference to this item also appears elsewhere in the record. (V. III, p. 1592, Defendants' Exhibit EE.)

The item hereinbefore referred to is claimed to be the same 300,000 yards of burlap invoiced by H. M. Newhall on June 20, 1929, and paid for by appellant by voucher No. 1865, July 27, 1929, under Newhall contract of April 3, 1929 (V. III, pp. 1319-1321, Plaintiff's Exhibit No. 87); this invoice of June 20, 1929, and the payment of July 27, 1929, also appears in the testimony of Almer Mayo Newhall. (V. IV, pp. 2082-3.) The payment was, however, $24,187.33, after deduction of a credit memorandum of $300.00 (V. IV,

p. 2083); Mr. Rosslow of Ernst & Ernst testifies that the invoice for this particular shipment which represented adjustment No. 20 had not been entered, the goods were actually there, but no entry was in the books for the invoice. (V. II, p. 916.)

Mr. Rickards of Hood & Strong, a certified public accountant, who did the work preparatory to the report, Plaintiff's Exhibit 2 (V. III, p. 1161; V. I, pp. 249-251) stated the procedure of Hood & Strong was as follows:

> "My attention being directed to page 3 of our report of October 21, 1930, and to the third item from the bottom of that page, we assert apparent inventory October 19, 1929 of $196,620.21. That amount was developed as follows: we start with an inventory certified to by Ernst & Ernst as of May 31, 1929 of $533,631.50. That represents the inventory on hand on May 31, 1929, and the executed inventory in transit but not received. We add thereto purchases from June 1, 1929, to October 19, 1929; customs charges for a similar period; direct labor on manufacturing bags for a similar period; insurance for a similar period; cartage for a similar period; freight for a similar period; bank charges on letters of credit for a similar period; State toll for a similar period; and arrive at a total of $1,173,384.40, representing goods to be accounted for. We find that the cost of the goods sold out of that total to be accounted for amounts to $976,764.19; therefore, deducting the cost of the goods sold from the total cost of the goods to be accounted for, we arrived at an apparent inventory on October 19, 1929, of $196,620.21.

Mr. Schmulowitz. Having arrived at that figure and having ascertained that the landed cost of the inventory of merchandise at 1328 Sansome Street as of October 19, 1929, was $63,672.77, what did you do to ascertain the quantity of merchandise at 243 Sacramento Street as of October 19, 1929?

A. We deducted the physical inventory taken at other locations than 243 Sacramento Street from the total inventory arrived at, at all locations, and arrived thereby at the inventory at 243 Sacramento Street.

Q. And that figure is represented by what sum?

A. $132,947.44."

If there is duplication in the item of $22,737.12, it occurred from the fact that Ernst & Ernst in their inventory of May 31, 1929, included goods which were not invoiced by Newhall until June 20, 1929; and Hood & Strong, adding to the inventory of May 31, 1929, subsequent purchases, naturally included these goods invoiced on June 20, 1929. It is plain that error could have occurred and if it did, it may have arisen from the fact that prior to the trial Mr. Rickards had not seen the work sheets of Ernst & Ernst (V. III, p. 1173), although after seeing the work sheet he stated that he was unable to identify the item of $22,737.12 with any of the purchases included in the Hood & Strong report. In this regard his testimony was as follows:

"Referring again to Defendants' Exhibit M, and to adjustment No. 20, by reference to that adjustment, and by reference to the other data

appearing upon that work sheet, that item involved in that adjustment of $22,737.12 apparently is included in the figure with which I started of $533,631.50. Yes, I have added to that figure last mentioned total purchases between May 31, 1929 and October 19, 1929, of $639,752.90. I have sought to determine whether any of the purchases included in that last-named figure are duplicated in the item involved in Adjustment No. 20. I am quite unable to identify the item contained in Adjustment No. 20 with any purchases that we have included in our report. I have been able to identify every purchase that we have included in the aggregate figure of $639,752.90. And from that I say that the aggregate of the purchases included in that figure is not a duplication of the item involved in Adjustment No. 20."

(V. III, p. 1210.)

He further stated that this shipment was divided into three lots he believed, Lot 2187 (V. III, p. 1238, Defendants' Exhibit U) and Lot 2200. (V. III, p. 1384; V. III, p. 1210.)

The Newhall invoice of June 20, 1929, showed the same markings as stock sheet 2199. (V. III, p. 1212.)

In the purchases from June 1, 1929, to the day of the fire, Mr. Rickards included 300,000 yards under these three lot numbers. In this regard he testified as follows:

"Q. And in your purchases from June 1, 1929, to the day of the fire you included the 300,000 yards of burlap under these three lot numbers?

A. Most assuredly I did, the invoice was dated June 20, and it would be foolish to think that any

one would have possession of goods for three weeks before billing them with it.

No, I did not know that Mr. Rosslow had included a correction in his statement of $22,737.12 for Lot No. 2199, H. M. Newhall, at the time of the preparation of our last report of October 13, 1931. I did not know that until I came into Court. I knew it when I was trying to locate that item of $22,000. Mr. Rosslow was there working with me part of the time. As to his telling me that was the item he had included, he could not identify it."

(V. III, pp. 1212-13.)

Without pursuing this matter further, we say that Ernst & Ernst may have included in their certified inventory of May 31, 1929, a shipment of 300,000 yards of burlap which were in the process of being received at that time, but for which no invoice had been entered, that Hood & Strong in their audit of purchases and sales from May 31, 1929 to October 19, 1929, included as goods received subsequent to May 31, 1929, the 300,000 yards previously counted and included in the Ernst & Ernst inventory.

If this duplication occurred, probably both firms of accountants are in part chargeable with the error. It is certain, however, that appellant had nothing to do with it, and there was no effort on his part except to procure an accurate report.

We refer the court to the following testimony in the record, showing the statements of the various witnesses in this regard:

In the first place, Mr. Hyland testified:

"I was not doing my own bookkeeping. That set of books had originally been installed by Klink, Bean & Co., of which Mr. Cooper, now of the firm of Cerf & Cooper, was the manager. I relied on that set of books being sufficient to take care of our requirements. I was not operating the books personally. That was in full charge of Mr. Taylor."

(V. I, p. 500.)

Again he testified:

"Answering your question as to whether I am and have been personally familiar with the bookkeeping system and with the records maintained by the Hyland Bag Company, I have never at any time had anything whatsoever to do with the bookkeeping. We had an accountant, Mr. George P. Taylor, in whom I had absolute faith and he was given full charge and I permitted him to run his department."

(V. I, p. 266.)

Then as to the second employment of Hood & Strong, he testified:

"We had employed the firm of Lybrand, Ross Bros. & Montgomery, the auditing firm, to do some work for us which we felt should be done on the use and occupancy hearing. During the progress of this investigation which was in charge of Mr. D. A. Parker as Lybrand's senior accountant, certain discrepancies were disclosed. Mr. Parker spoke to me about these and he stated that it would be a good idea to have Hood & Strong, who had formerly done some work for us, at the

beginning, or shortly after the fire, make a further survey, or investigation, of it. That was the reason for employing Hood & Strong in the second instance. In other words, I acted on the suggestion of Mr. Parker."

Again referring to this second report, he testified:

"Subsequently, in 1930, we called upon Hood & Strong to make another report. I do not recall the exact date. Yes, it was subsequent to the filing of our original complaint in which we set forth a loss of $76,000. I cannot answer your question as to whether there were any other records available to Hood & Strong in 1930. I certainly instructed Mr. Taylor to turn over what records they required to have the work done. That is all. I had nothing whatever to do with the details of it. I do not recall at this moment the reasons for again employing them. I do not recall the details of the claim set forth in our amended complaint; I know the claim was increased and filed. I had nothing whatever to do with the making up of these claims, or the details of them. I verified all of them, assuming that the men in charge of this work were dependable and inasmuch as I could not do it personally there was nothing else for me to do. To some extent, yes, it did cause some curiosity on my part that our claim had been increased by $35,000. As to my personally making any investigation to satisfy my curiosity as to the reason for raising the claim, *I had the accountants go over the books to find out the exact condition of our affairs; based upon their report, a new claim was filed.* That is all I can tell you."

(V. I, pp. 514-15.)

Elsewhere the reason for the increased claim, as shown in the amended complaint appears. Thus in the testimony of appellant, Defendants' Exhibit B, the following appears:

> "Claim increased from original proof of loss 73,000? to present claim, because H. & S. audit and this audit found the first claim understated and therefore we amended it to present amt."
>
> (V. I, p. 440.)

Again he states:

> "Answering your question why if we had such records did we employ Hood & Strong, *my reason for employing Hood & Strong was that I wanted to be absolutely certain beyond any possible doubt that the amount we had claimed was correct.*"
>
> (V. I, p. 513.)

Appellant set forth in his amended complaint in reference to his increased claim

> "That since the said preliminary proofs of loss were filed, the plaintiff has ascertained more accurately the actual damage suffered by him."

The statements of appellant are corroborated by the testimony of the accountants.

As to the second report which was the basis of the claim in the amended complaint, the testimony of Edward H. Lamont was as follows:

> "Yes, I received instructions to prepare the next report, the one of September (October), 1930, Exhibit No. 2. I received those instructions from Mr. Hyland. The instructions were

verbal. The conversation took place in Mr. Hyland's office. I believe in the fall of 1930, and present were Mr. Rickards, of my own office, Mr. Parker, an accountant in the employ of Mr. Hyland, and Mr. Hyland, himself. The instructions were that here was an inventory as certified by Ernst & Ernst as of a certain date, and using that as a basis to audit the purchases and sales and compute an inventory as of October, whatever the date is. Yes, that in September, 1930—was the first time I learned that there had been a physical inventory taken by Ernst & Ernst as of May 31, 1929."

As to this report the testimony of Frederick W. Rickards of Hood & Strong was as follows:

"As to the instructions that I received when I went down to the Hyland Bag Company in October of 1930, I was informed that we had prepared a report sometime previously on the gross profit percentage basis, there being at that time apparently not available any physical inventory. I was told that it was since discovered and developed through the auditor of Messrs. Leiber, Ross Bros. & Montgomery, that there was available a physical inventory taken by Messrs. Ernst & Ernst as of May 31, 1929; that this inventory was fully certified to and that I could use that as a basis for the *preparation of more accurate figures.*"

It is apparent, therefore, that the entire purpose of the second report of Hood & Strong was to start on the firmer foundation of the certified inventory of Ernst & Ernst, and to prepare a more accurate claim

than that represented by the first report of Hood & Strong. There is positively nowhere in the whole six volumes of testimony from end to end, any suggestion that appellant attempted to procure other than the most accurate reports possible.

If this item of $22,737.12 is a duplication, it is simply a duplication by mistake and not otherwise.

(4) As to the item of $7725.00.

Appellees also claim there should be deducted from the apparent inventory of Hood & Strong (Plaintiff's Exhibit 2, V. I, pp. 249-251), which was the basis of appellant's claim in his amended complaint, an item of $7725.00 representing the value of 50 bales of burlap. In this regard the claim of appellees is set forth in the testimony of their accountant, Mr. Hart.

> "Yes, I have had occasion to study the records of the Hyland Bag Company at other places relative to certain 50 bales of 37-10 burlap purchased from H. M. Newhall & Co., arriving in San Francisco on the steamship 'President Jefferson' in April of 1929. Yes, as a result of my efforts I have been informed when this burlap was received by the Hyland Bag Company. We were compelled to go to outside sources in order to establish to our own satisfaction that this material or merchandise was actually received by the Hyland Bag Company in the month of April, 1929. In order to establish it to our satisfaction, we were shown a copy of a letter from the Dollar Steamship Company wherein the date of the delivery was shown of this merchandise to the Hyland Bag Company. We also inspected other

documents, delivery orders from the H. M. Newhall Co., and after such inspection we were satisfied it was received in April, 1929. You show me Defendants' Exhibit QQ, being a letter from the Dollar Steamship Company of November 17, 1931, addressed to Thornton & Watt, yes, this is the letter I had reference to. That letter does show that a delivery of this 50 bales was made on April 25 and April 26, 1929, to the Hyland Bag Company. Yes, that was over a month prior to Mr. Rosslow's report and his figuring. Yes, I did find from my studies that this same item of 50 bales that was received in April was included by Hood & Strong as a purchase of goods subsequent to the 31st of May and prior to the day of the fire. Answering your question, what have I in mind—the invoice of purchase that was included by Messrs. Hood & Strong? the invoice, as I recall, I have not familiarized myself with that. The invoice from H. M. Newhall in amount which was $15,450, covering 100 bales of 37-10 burlap, consisting of two different lots of 50 bales each, one from the Steamship 'President Jackson' and one from the Steamship 'President Jefferson'. Plaintiff's Exhibit 88, H. M. Newhall & Co. invoice of August 6, 1929, referring to 50 bales of 37-10 AB mill burlap ex 'President Jefferson' is the invoice I have reference to. That is correct, it is my testimony that Hood & Strong included as a purchase subsequent to May 31, these goods which were delivered to the Hyland Bag Company on the 25th and 26th of April. The amount of the item reflecting these 50 bales is $7,725. In my opinion, this sum of $7,725 should be deducted from the total of $132,947.44 found by Hood & Strong."

According to the testimony of Mr. Taylor, the material included in this item was first stored for H. M. Newhall & Co. (V. VI, pp. 3182-4.) Then it was used by permission of Newhall & Co. in lieu of a portion of the shipment from the steamer "Silver Elm" which was defective. (V. VI, p. 3183.) This defective shipment is the one concerning which the duplication is claimed in reference to the item of $22,737.12. Subsequently the defective material was also purchased. (V. VI, p. 3183.) He testified that neither lots No. 2187, Defendants' Exhibit U (V. III, p. 1238), nor lot No. 2200, Plaintiff's Exhibit 96 (V. III, p. 1384), appeared on the Ernst & Ernst inventory of May 31, 1929. (V. VI, p. 3185.)

The testimony of Mr. Taylor upon this matter is supported by the testimony of Almer Mayo Newhall, a witness for defendants, and by Plaintiff's Exhibit No. 135. (V. IV, pp. 2122-4.)

Mr. Parker, one of appellant's accountants made a very careful analysis of this transaction (V. VI, pp. 3347-3352) and stated that this item was not included in the Ernst & Ernst inventory of May 31, 1929 (V. VI, p. 3350), and therefore the inclusion of this item by Hood & Strong as a purchase subsequent to May 31, 1929, and prior to the date of the fire is a correct inclusion, and cannot possibly be a duplication, and should not be deducted from the Hood & Strong inventory. (V. VI, p. 3350.)

We believe a careful examination of this matter demonstrates the fact that there is no duplication of this item of $7725.00, and that it should not be de-

ducted from the Hood & Strong report of apparent inventory on which plaintiff's amended complaint was based. (V. I, pp. 249-252; Plaintiff's Exhibit 2.)

(5) The item of $300.00.

The testimony of the accountant of appellees as to the item of $300.00 is as follows:

> "As to whether there are any other deductions which, in my opinion, should be made from this total found by Hood & Strong, there is an item of $300 covering a credit memorandum that was issued by H. M. Newhall & Co. to the Hyland Bag Company that should apply as a reduction of the cost of the burlap that was purchased in the item represented by 150 bales, 300,000 yards of 37-10 burlap. That was not treated by Hood & Strong in the preparation of their report."
>
> (V. IV, p. 2315.)

The conclusion of Mr. Parker, one of appellant's accountants, after study, was as follows:

> "I admit there should be deducted the credit of $300.00 referred to by Mr. Hart."
>
> (V. VI, p. 3359.)

It appears that Hood & Strong in calculating the cost of burlap received from May 31, 1929, to October 19, 1929, the day of the fire, included the total original cost and made no allowance for a credit memorandum for $300.00 issued for defective material, and should therefore, have been deducted from the cost of material in their calculations. This could not be other than an oversight on their part.

(6) The claimed fraudulent changes in stock sheets.

The appellees refer to Plaintiff's Exhibit No. 98 Stock Sheet 2199 (V. III, p. 1393) to Defendants' Exhibit U, Stock Sheet 2187 (V. III, p. 1238), to Plaintiff's Exhibit No. 96, Stock Sheet 2200 (V. III, p. 1384), and to Plaintiff's Exhibit No. 84, Stock Sheet 559 (V. III, p. 1309), and claim that the changes thereon are fraudulent, and they refer to the loose leaf sheets used by appellant in his business.

We believe that it is common practice among corporations doing a large business to use a loose leaf system, but in any event it would seem that, using such a system, if any one desired to make false entries they would not make alterations upon the face of the record, but the old record would have been destroyed and an entirely new record, which contained the entries desired, would be made up.

These various exhibits were altered. They were altered by Mr. Taylor, appellant's bookkeeper. When he was first upon the stand he had forgotten the transactions upon which the sheets were based, and could not fully explain them. (V. III, pp. 1463-64.) However, later his mind was refreshed and he recalled the transactions. We believe that how the confusion arose, and exactly how the changes occurred, appear in his testimony (V. VI, pp. 3182-3), and in the testimony of Miss Georgia Mitchell. (V. VI, pp. 3115 and 3122.)

There was considerable confusion in the transactions involved under these stock sheets. The facts of the matter seem to have been as follows:

That 50 bales of burlap arrived by the Steamer "President Jefferson" about April 17, 1929, under Newhall contract No. 9486. The appellant claimed that he had not agreed to purchase this material, and it was stored for Newhall & Co.

Another 50 bales of burlap arrived about June 4, 1929, under the same contract, by the Steamer "President Jackson", which was also stored for Newhall & Co.

In the meantime, at the end of May or the first of June, 150 bales of burlap arrived by the Steamer "Silver Elm", which the appellant had purchased. This material, however, was found to be defective, and so appellant was permitted to use the two 50 bale lots which he was storing for Newhall & Co., in lieu of the 100 bales of the defective material. This defective material was then held in storage for Newhall & Co. Later, in the month of July, this 100 bales of defective material was purchased by appellant from Newhall & Co.

These transactions are covered by Stock Sheets 2187, 2199 and 2200. The 150 bales which was admittedly purchased was invoiced to appellant on June 20th. The arrival of the material before the invoice date evidently contributed to the confusion for some of the changes in the Stock Sheet 2199 were evidently made to conform to the invoice dates.

We ask the court to particularly consider the testimony of Miss Mitchell and Mr. Taylor, to which we have referred in connection with these claimed fraudu-

dent entries. With this confusion of transactions, we believe it is clear that any confusion in the stock sheets cannot possibly be attributed to any fraudulent purpose.

Conclusion upon the question of fraudulent manipulations of records.

We have discussed above every item which the accountant for appellees claimed were erroneously included in the apparent inventory of Hood & Strong, which was the basis of appellant's claim in his amended complaint. We ask the court in all fairness is there any basis whatsoever for any claim that appellant did not act honestly and in good faith in this matter?

First. It is apparent that the suggestion of Hood & Strong's report, Plaintiff's Exhibit No. 2, arose not from appellant but from an employee of a reputable accounting firm, Mr. Parker of Lybrand, Ross Bros. & Montgomery;

Second. The instructions of appellant to Hood & Strong were to use as a basis the certified inventory of Ernst & Ernst of May 31, 1929, and audit purchases and sales thereafter to the date of the fire, and produce a more accurate report of his inventory than that which appeared in their prior report, Plaintiff's Exhibit No. 1, and which was obviously an estimate;

Third. Even the accountant for appellees testified that the method of arriving at this second report and basing it upon the certified inventory of Ernst &

Ernst, was in accordance with sound accounting practice;

Fourth. The accountants for appellant concede in this report that there was one error of $300.00, and it was obviously an oversight in calculation of the cost of merchandise;

Fifth. Except as to the item of $300.00 and the item of $22,737.12, we believe the evidence shows that the report of Hood & Strong, Plaintiff's Exhibit No. 2, is correct;

Sixth. That as to the item of $22,737.12, there may be a duplication and if so this is a proper deduction from the said apparent inventory as shown by Plaintiff's Exhibit No. 2. We point out, however, that Mr. Rosslow of the firm of Ernst & Ernst was unable to identify this item as a duplication, that Mr. Rickards of Hood & Strong could not identify the item as a duplication, and Mr. Parker, formerly of the firm of Lybrand, Ross Bros. & Montgomery was definitely of the opinion that the deduction of this item as a duplication was not justified. Mr. Taylor, appellant's bookkeeper, testified that he kept true books, and there were no false entries therein (V. III, p. 1474), and that he had assisted several auditors and placed at their disposal all information and data (V. III, p. 1380) and that he could not determine the matter. (V. III, pp. 1508-9.) Counsel for appellant on the trial stated that everything possible on the particular item had been placed before the court and he felt that until it was possible to demonstrate that there was a duplication, there was doubt as to that item

(V. III, p. 1581); and during the course of the trial counsel for plaintiff suggested that the court appoint an entirely independent accountant to examine plaintiff's books, "it being the desire of plaintiff to obtain no more and no less than the amount to which he is justly entitled as reflecting his loss as of the date of the fire". (V. III, p. 1296.) The court at first decided to follow this suggestion (V. III, pp. 1297, 1424) but later and finally, upon objections of counsel for appellees, stated that he would defer the appointment of a master until after the testimony was in, and none was ever appointed. (V. III, p. 1591.) We have pointed out in appellant's brief heretofore filed, not only that appellant was not in personal charge of the factory at the time of the fire, but even if he had been, its size and the vast quantity of merchandise on hand would have made it necessary for him to rely on accountants; his own bookkeeper stated that he had no accurate inventory, and from his own observations of ashes and debris, appellant believed that something was burned up.

What was more reasonable than to call in certified public accountants to audit his records and determine what was, or should have been on hand, and what more reasonable than to rely upon the reports of these accountants who reported to him: "We have developed the sum of $132,947.44 as being, in our opinion, a conservative valuation of the merchandise on hand at 243 Sacramento Street, at the close of business, October 19, 1929." (Plaintiff's Exhibit No. 2, Report of Hood & Strong on which plaintiff's amended complaint was based. V. I, p. 250.)

Assuming a duplication occurred, is it going to be charged to an attempt to defraud by Ernst & Ernst represented by Mr. Rosslow; by Hood & Strong, represented by Mr. Lamont and Mr. Rickards; by Mr. Parker, or by Mr. Taylor; or were all of these gentlemen acting together in an attempt to defraud? Isn't it true, rather, that any duplication, if it occurred, was simply a human mistake? All human action involves the possibility of human error, and it would have been phenomenal if no mistakes had occurred in appellant's books. The appellant did his best to prevent mistakes in his claim by employing reputable certified public accountants to furnish him an accurate report. That the report may have been in part erroneous should not be considered for a moment as a cause of forfeiture of his entire claim.

And we again repeat, that appellant never placed a figure in, or changed a figure in his books, and never directed or suggested to any person that any false entry or change be made therein.

FURTHER DISCUSSING THE QUESTION OF FALSE SWEARING.

The claimed false swearing as to plaintiff's knowledge as to the origin of the fire.

The alleged false swearing of plaintiff as to the *origin* of the fire was not discussed in appellant's brief heretofore filed for the reason that the trial court apparently held that any false swearing in this respect was immaterial and was not intended to deceive, did not accomplish any deceit, and the decision against appellant was not based upon this ground.

The court's statement was:

> "Since the evidence of incendiarism was equally well known to both plaintiff and defendants, and plaintiff knew that, there was no deception accomplished and perhaps none intended. I do not believe that this defense would alone justify a denial of recovery to plaintiff."
>
> (V. I, p. 179.)

The appellant under the law of California was not required to communicate to the appellees his judgment from the evidence that the fire was incendiary. At the time of the fire, Sec. 2570 of the Civil Code of California, provided:

> "Sec. 2570. Matters of Opinion. Neither party to a contract of insurance is bound to communicate, even upon inquiry, information of his own judgment upon the matters in question."

Under this provision of law, appellant was not required to express his judgment and opinion or any evidence that indicated that the fire was incendiary.

Moreover, any expression on his part as to incendiarism was absolutely immaterial, for appellees, through their organization, the underwriters fire patrol, and through their adjusters, knew every fact, and perhaps more than appellant, about the incendiarism. The statement of appellant that the origin of the fire was unknown to him is not found to have been intended to deceive, it did not deceive, and under the circumstances it could not have deceived. Hence it was not false swearing as a matter of law.

> "The untrue statement, in order to avoid the policy, must have been knowingly and inten-

tionally made by the insured with knowledge of its falsity, *and with the intention of defrauding the company.*"

Miller v. Fireman's Fund Ins. Co., 6 Cal. App. 395, 398, citing

Clarke v. Phoenix Ins. Co., 36 Cal. 168;

Helbing v. Svea Ins. Co., 54 Cal. 156 (35 Am. Rep. 72);

Greiss v. State etc. Co., 98 Cal. 241 (33 Pac. 195);

West Coast Lumber Co. v. State Ins. Co., 98 Cal. 502 (33 Pac. 258).

The appellant unless he set the fire or saw it set, however persuasive the evidence of incendiarism, was legally swearing to the truth in stating that the origin of the fire was unknown.

Jones v. Howard Ins. Co., 22 N. E. 578.

The alleged false swearing in the amended complaint.

The claim of defendants in this regard was that plaintiff swore that his loss was $106,000.00 when he knew it did not exceed $35,000.00.

This claimed false swearing was not specifically and separately considered in appellant's brief heretofore filed. There were three reasons for the omission:

First. It was deemed that it was covered by the discussion of the claimed false swearing in the proof of loss, and that there was no false swearing in fact. (Appellant's Brief pp. 19-36.)

Second. Filing a verified complaint cannot be deemed false swearing within the meaning of the

policy provision for forfeiture for fraud and false swearing.

Third. In the final analysis the trial court apparently rested its decision on false swearing in the proof of loss.

We take this opportunity of considering this question of false swearing in the amended complaint and set forth briefly the foregoing matters in reverse of the order stated:

Third: The trial court rested its decision on false swearing in the proof of loss.

On denying petition for a rehearing the trial court apparently brushed aside any other basis or reason for its decision and elected to rest its decision on false swearing in the proof of loss. In this regard the court stated:

> "Second, in order to avoid any possible misunderstanding, I find that plaintiff was guilty of wilful and intentional fraud and false swearing *in making his proofs of loss.* The petition for a rehearing is denied." (Italics ours.)
>
> (V. I, p. 233.)

From this language it would seem that the alleged false swearing in the amended complaint was not a basis for the decision of the trial court.

Second: Filing a verified complaint is not in law false swearing within the meaning of the policy provision for forfeiture for fraud and false swearing.

The section of the policy pertaining to forfeiture for fraud and false swearing does not apply to a claim for

an excessive amount in a complaint filed in an action, nor to false testimony upon a trial. After the parties have been unable to settle a loss and it has become necessary for the insured to seek the aid of a court, the parties are dealing at arms length, and the insured owes no further duty to the company under the policy. The provision of the policy for forfeiture for fraud or false swearing has reference to claims and representations made under oath to the insurer in investigating the loss and while the parties are attempting to adjust it. It cannot be intended to refer to a sworn complaint or to testimony in a case for these representations are made to the court and not to the insurer. That such is the intent and meaning of the provision in the policy of insurance is indicated by reference to Section 549 of the Penal Code which counsel state the Legislature adopted "as a further expression of its intentions and the meaning of this provision". Nothing in the section indicates its application to a verified complaint or to testimony in a case.

That the provision for forfeiture for fraud and false swearing does not apply to an excessive claim in a complaint or to false testimony in the case has been held in a number of cases.

In the case of *Goldberg v. Provident Washington Ins. Co.,* 87 S. E. 1077, 1079 (Ga.), the Supreme Court of Georgia reversed a judgment for defendant and held that a wilful misstatement of fact by the plaintiff on the trial of a claim in the complaint for property which he knew was not damaged or destroyed, or overvaluations knowingly made by plaintiff on the trial were not grounds for forfeiture.

The exact language of the court after quoting the provision of the policy similar to the one relied on in the case at bar was as follows:

> "And the court gave certain instructions to the jury, especially in those portions complained of in grounds 12, 13 and 14 of the motion for a new trial, which, while in part authorized under the provisions of the policy just quoted and under the evidence in the case, were too broad, in that they in effect instructed the jury, or contained language from which the jury might infer, that a willful misstatement of fact by the plaintiff on the trial in regard to the value of the property insured, or even a claim in the petition filed in the suit to recover for property known by the plaintiff not to have been damaged or destroyed by the fire, or overvaluations knowingly made by the plaintiff in the trial of the case, for the purpose of collecting more money than he is entitled to, were grounds of forfeiture of the policy. We do not think that the clause of the policy under consideration had so broad a scope. It did not make perjury on the part of the plaintiff in giving testimony on the trial a ground of forfeiture; nor do we think that under it a mere overclaim, though knowingly made, in the plaintiff's petition, would work a forfeiture. But it related rather to proofs of loss and other statements made under oath by the plaintiff, and other such preliminary matters involving dealings between the insured and the insurer, such as statements or representations made by the former to the latter in regard to the damages or losses claimed to be covered by the policy. It would cover cases of fraudulent misrepresentation of material facts or circumstances,

made by the plaintiff to the company or its agents, that might affect the action of the insurer in respect to settling or adjusting the claim of the insured, but would not cover, as said above, an exaggerated claim of loss made in the petition, or perjury committed by the plaintiff during the trial."

In reference to a similar provision the Kansas City Court of Appeals of Missouri used the following language:

"We think the provision of the policy last quoted, so far as it has reference to matters occurring after the loss, refers to misrepresentations, fraud, and false swearing made by the insured to induce the company to pay the loss, that is fraud, committed while the loss was being investigated by the company to determine whether or not to pay the loss, and has no reference to matters arising after the company's refusal to pay the loss, and suit has been filed. The false swearing of McAninch in his deposition was after suit was filed, and at that time the parties were dealing with each other at arm's length, and there was no legal duty upon McAninch to relate the true circumstance surrounding the giving of this mortgage. He had a perfect right to treat the matter in any way he desired after defendant refused payment and suit was brought and until he was placed under oath on the witness stand. Then if he committed perjury, the policy did not cover that."

Third National Bank v. Yorkshire Ins. Co., 268 S. W. 445, 449.

In the case of *Dietz v. Providence Washington Ins. Co.*, 11 S. E. 50, 58, the Supreme Court of West Virginia referring to a similar provision for forfeiture stated:

> "The rights of the parties must be determined as they existed when the suit was commenced, and no affidavit of John K. Keitz made after that time could affect the rights of the owner of the property. After the company had denied its liability under the policy, they could not take advantage of the breach of any of the conditions thereof made after action commenced. No false swearing after the suit was instituted could change the rights of the parties as they stood when the writ issued."

In the cases where anything contrary to the foregoing rule has been stated, the statement will be found to be purely obiter, or based upon a different policy provision, or not well considered.

First: There was no false swearing in fact in the amended complaint.

In appellant's brief heretofore filed in discussing the alleged false swearing in the proof of loss, it is demonstrated, we believe, that there was no false swearing by plaintiff in law or fact in his proof of loss. Without actual knowledge, or the possibility of actual personal knowledge of the amount of his loss, his claim was based upon an estimate of his stock on hand made by accountants. The calculation and method thereof was given to defendants before the proof of loss was filed, and was made a part of the

loss. The method was reasonable, there was no possibility of deceit, and the claim could not constitute false swearing.

The claim in the amended complaint was based upon what was intended and expected to be a more accurate report of accountants since it was based upon an audit, and the claim in the proof of loss was not. The method was reasonable there was no possibility of deceit, and hence the claim could not constitute false swearing.

The discussion of these matters in appellant's brief pp. 19-36, to which we ask the court to refer, is also applicable to the claimed false swearing in the amended complaint. It was supposed, however, that the claim in the amended complaint was more accurate than the claim in the proof of loss, since it was based upon an audit, while the claim in the proof of loss was not. For a full consideration of the basis of the amended complaint, whereby it appears that there was no false swearing in fact, we also ask the court to refer to the discussion of the claimed manipulation of records of appellant pp. 30-57 of this brief.

Any claim of forfeiture for false swearing by the amended complaint herein is ridiculous, both in law and in fact.

Claimed false swearing in the testimony.

The authorities hereinbefore cited which show that there can be no forfeiture for claimed false swearing in a pleading in a case, likewise holds that no for-

feiture can be had for false testimony. We again refer to these authorities:

Goldberg v. Provident Washington Ins. Co., 87 S. E. 1077-1079 (Ga.);

Dietz v. Providence Washington Ins. Co., 11 S. E. 50, 58;

Third Natl. Bank v. Yorkshire Ins. Co., 268 S. W. 445, 449.

It would be absurd to hold that a forfeiture should be granted because a trial court did not believe some testimony of the plaintiff in the case. To permit such forfeiture would place every insured at the arbitrary mercy of the trial court, and without effective remedy by appeal.

We point out, moreover, that in the case at bar there is no specification of testimony of appellant which the court finds was false, and upon one of the principal issues, the question of whether or not there was any out of sight loss, the court sustained appellant and found there was some out of sight loss, and thereby necessarily found that the witnesses for defendants were (we'll have the consideration to say) mistaken.

Under the law and facts it cannot be held there is any forfeiture in this case by reason of any testimony in the case.

Further on the law of false swearing.

The policies here involved are the standard form under the law of California, and were executed and de-

livered in California, and the law of California is applicable.

Aetna Life Ins. Co. v. Geher, 50 F. (2) 657 (C. C. A. 9th).

The law of California on the question of forfeiture for fraud and false swearing requires that the sworn statement:

1. Be made by the insured.

(Terms of policy provide: "Fraud or false swearing by the insured.")

Miller v. Fireman's Fund Ins. Co., 6 Cal. App. 395, 398;

Singleton v. Hartford Fire Ins. Co., 127 Cal. App. 635, 646.

2. The false statement must be "knowingly and intentionally made".

Pedrotti v. Am. Nat. Fire Ins. Co., 90 C. A. 668, 671;

Raulet v. Northwestern etc. Ins. Co., 157 Cal. 213, 236.

A negligent or careless statement is not false swearing.

"The question of negligence is not involved. The law favors the insured to the extent of excusing a careless statement if it does not proceed from a fraudulent and wilful intent."

Miller v. Fireman's Fund Ins. Co., 6 Cal. App. 395, 400 (hearing denied by Supreme Court).

A statement false by mistake or inadvertence does not amount to false swearing.

3. The statement must be made "with the intention of defrauding the insurer".

Pedrotti v. Am. Nat. Fire Ins. Co., 90 C. A. 668, 671;

Miller v. Fireman's Fund Ins. Co., 6 Cal. App. 395, 398;

West Coast Lumber Co. v. State Inv. & Ins. Co., 98 Cal. 502, 510.

4. A discrepancy in the loss claimed and the loss proved raises no inference of false swearing.

Helbing v. Svea Ins. Co., 54 Cal. 156, 159;

Clarke v. Phoenix Ins. Co., 36 Cal. 168, 176.

The discrepancy does not cast the burden on the insured to establish that his statement was not intentionally false.

Singleton v. Hartford Fire Ins. Co., 127 Cal. App. 635, 646;

Helbing v. Svea Ins. Co., 54 Cal. App. 156.

5. The false statement must be false in reference to a material matter.

26. *C. J.* 516.

6. The defense of fraud or false swearing is an affirmative defense and must be specially pleaded.

Greiss v. State Inv. & Ins. Co., 98 Cal. 241;

Capuro v. Builders Ins. Co., 39 Cal. 123;

26 *C. J.* 499.

7. The burden of proof as to alleged false swearing is on the insurer.

26 *C. J.* 516.

"The burden of proof in establishing the defense interposed is upon the defendant. Fraud is not to be presumed. It must be affirmatively shown."

Oshkosh Packing & Prov. Co. v. Mercantile Ins. Co., 31 Fed. 200, 206.

8. If such a state of facts is presented as leaves a reasonable presumption of mistake or misapprehension on the part of the person charged with false swearing, such presumption should be indulged in preference to that of wilful false swearing.

West Coast Lumber Co. v. State Inv. & Ins. Co., 98 Cal. 502, 511;

Singleton v. Hartford Fire Ins. Co., 127 Cal. 635, 647.

9. The statement must have been such that it could have deceived.

A statement which is a mere estimate, or upon a matter upon which defendants are fully informed, is not false swearing.

Helbing v. Svea Ins. Co., 54 Cal. 156;

Maher v. Hibernia Ins. Co., 67 N. Y. 283, 292.

"A mere wilfully false statement will not work a forfeiture of a policy of insurance, under a condition that 'all fraud or attempt at fraud, by false swearing or otherwise' should cause such forfeiture, when such false statement could not deceive the insurance company to its injury."

Shaw v. Scottish Commercial Ins. Co., 1 Fed. 761.

THE LAW OF CALIFORNIA IS STRONGLY OPPOSED TO FORFEITURES.

Conditions involving forfeiture must be strictly construed.

Civil Code, Sec. 1542.

Contracts providing for liquidated damages are unenforceable unless the damages suffered would be impracticable or extremely difficult to ascertain.

Civil Code, Sec. 1671.

> "A penalty need not take the form of a stipulated fixed sum; any provision by which money or property would be forfeited without regard to the actual damage suffered would be an unenforceable penalty."
>
> *Ebbert v. Mercantile Trust Co.,* 213 Cal. 496, 499.

> "Here the plaintiff had sustained no damage at all, and it would seem to violate all rules of honesty and fair dealing to allow him to take from the defendants the large sum claimed."
>
> *Eva v. McMahon,* 77 Cal. 467, 472 (action to recover agreed liquidated damages).

In another view of this case it may even be said that the provision in these policies of insurance for forfeiture for fraud and false swearing have no application to proofs of loss, but that any false swearing to be a ground of forfeiture must be in reference to some matter entering into or pertaining to the contract of insurance itself. In this regard the view is that upon the occurrence of a loss, the right of the

insured becomes vested, and his rights in California cannot be forfeited for any statements thereafter pertaining to the loss. None of the higher courts of California have passed on this question, but so far as we have been able to ascertain it has not been necessary for them to do so. We do not believe there is any case in California reports where the insured has been deprived of his insurance by false swearing as to his loss.

The provisions in the policies in the case at bar cover false swearing relating to the insurance or the subject thereof. A reasonable construction is that the fraud or false swearing, though it may be done after the loss, must concern the insurance or the insured property before the loss. Nothing is said about a false claim or proof of loss. If there is any uncertainty or ambiguity, the contract should be construed to avoid a forfeiture.

> "It is well established that conditions which provide for a forfeiture of the interest of the assured or other persons claiming under the policy are to be strictly construed against the insurance company, and if there is any ambiguity in a policy which may reasonably be solved by either one of two constructions, that interpretation shall be adopted which is the most favorable to the assured."
>
> *Welch v. British Am. Ins. Co.,* 148 Cal. 223, 226;
>
> *Globe & Rutgers, Fire Ins. Co. v. King Foong Silk Filature,* 18 F. (2) 6 (C. C. A. 9th).

THE LAW OF CALIFORNIA IS STRONGLY IN FAVOR OF WAIVERS OF FORFEITURE.

In a large number of decisions pertaining to insurance, the courts of California have indicated their favor toward the waiver of any forfeiture cleamed against the insured.

In the case of *Faris v. American National Ins. Co.*, 44 Cal. App. 48, 56, the court states:

> "The forfeiture provision of the contract was solely for the benefit of the insurer, and as such could be waived by the company if it chose to do so. It is true that the policy provided that the insurance should ipso facto cease and determine upon the default of the insured, but nevertheless by the decisions of the Supreme Court of this State it has been held that under similar provisions, if the Insurance Company, after knowledge of said default, enters into negotiations or transactions with the assured which recognize the continued validity of the policy and treats it as still in force, the right to claim a forfeiture for such previous default is waived."

In the case of *Mackintosh v. Agricultural Fire Ins. Co.*, 150 Cal. 440, 448, a case of claimed forfeiture by reason of increased hazard, the Supreme Court of California reversed the judgment of the trial court and held the claimed forfeiture had been waived and quoted with approval the following language from 3 Cooley's Briefs on Insurance, page 2657:

> "If an insurance company, with knowledge of facts vitiating a policy, by its acts, declarations, or dealings leads the insured to regard himself as protected by the policy, or induces him to incur

trouble or expense, such acts, transactions, or declarations will operate as a waiver of forfeiture, and estop the company from relying thereon as a defense to an action on the policy."

It is well settled in California that forfeiture clauses of an insurance policy may be orally waived.

Linsky v. Scottish Union, etc. Ins. Co., 68 Cal. App. 688, 689.

Citing:

Bank of Anderson v. Home Ins. Co., 14 Cal. App. 208, 213;

Mackintosh v. Agricultural Fire Ins. Co., 150 Cal. 440, 447;

McCollough v. Home Ins. Co., 155 Cal. 659, 664;

Faris v. American Nat. Ins. Co., 44 Cal. App. 48, 58;

Farnum v. Phoenix Ins. Co., 83 Cal. 246, 261;

Raulet v. Northwestern Ins. Co., 157 Cal. 213, 233;

Knarston v. Manhattan Ins. Co., 140 Cal. 57, 63.

"Provisions in an insurance policy are always construed so as to prevent a forfeiture, if the language will reasonably permit such a construction."

O'Neill v. Caledonian Ins. Co., 166 Cal. 310, 315.

In the case of *Young v. California Ins. Co.,* 46 P. (2) 718, decided last year, the Supreme Court of Idaho held that where the insurer specified certain objections to the proofs of loss and did not specify false swearing until their answer in the action, the defense was waived.

The language of the court is as follows:

"Appellants nowhere, if we correctly read the correspondence, based their non-liability and so notified respondent, upon false and fraudulent statements made in the proofs of loss, but upon other grounds, and first urged their non-liability, predicated upon fraud and false swearing in the proofs of loss, in their answer in this action. In such circumstances appellants are not permitted to avail themselves of the defense of fraud or false swearing, the rule being that only specified defects can be relied upon as a defense and others, not specified are waived.

'An insurer, by specifying a certain or particular defect or defects in proofs of loss, waives all other defects therein. And since a requirement that notice of loss be given is for the purpose of enabling the insurer promptly to investigate, such notice is waived where the insurer sends its local agent and adjuster to examine the property, and later objects to the proofs of loss as furnished, but does not mention the fact that the notice was oral, and not written as required by the policy * * *. The rule that only specified defects can be relied on as a defense, and others not specified are waived, also applies where insurer notifies insured that it refuses settlement for 'noncompliance' with the contract time for filing proofs, and other reasons * * *. 7 Couch Cyclopedia of Insurance Law, Sec. 1593, p. 5593.' "

To same effect see,

Ward v. Queen City Fire Ins. Co., 67 Ore. 347, 138 p. 1067.

REPLYING TO APPELLEES' BRIEFS.

A. REPLYING TO BRIEF OF APPELLEE, WESTERN INSURANCE CO. OF AMERICA.

Pages 2-3. The maxims "he who seeks equity must do equity" and "he who seeks equity must come with clean hands," have no application against appellant in this case.

Defendants must rely upon their interpretation of a forfeiture provision in an insurance policy, and otherwise have no defense.

Phoenix Ins. Co. v. Moog, 78 Ala. 284, 302.

Pages 4-7. This is a fair statement as to the nature of the action.

Pages 7-8. The reference to the insurance carried is sufficiently covered by appellant's brief, pages 62-66. Appellees' own representative testified there was nothing extraordinary about a fluctuating stock being over insured. There is no showing that there was any other over insurance.

Pages 9-13. Though we do not know, we have written our briefs on the assumption that the fire was of incendiary origin, the amount of damage was disputed.

Pages 13-16. As to the extent of the fire, the testimony was conflicting. It seems valueless to enter into this conflict. Be it said that the official report of the San Francisco Fire Department made at the time of the fire shows that it was much more serious than would appear from the oral testimony of the firemen given two years later. (Plaintiff's Exhibit 168; V. VI, pp. 3376-8.) A contemporaneous newspaper account

also showed it was a serious fire. (Plaintiff's Exhibit 123; V. IV, pp. 1948, 1951.)

Pages 16-28. We agree that the figures stated show correctly the book valuations at the time of the fire. This is Taylor's testimony. We do not agree, however, that it was necessary for appellant to assume the correctness of this figure when his own bookkeeper testifies that the actual inventory was always much greater than his books, and Mr. Smith, the representative of several appellees himself stated that book inventories were unreliable. This matter is covered in appellant's brief pages 29-33. Even if it should be now demonstrated as a fact that appellant had less than $90,000.00 worth of goods on hand in his factory by actual inventory as distinguished from his books, this shows no false swearing.

Pages 28-43. The statement of the accounting method used by Hood & Strong to arrive at the value of merchandise at the Sacramento Street plant is satisfactory. Appellee is incorrect in assuming that by a similar method the values at Sansome Street in their first report would have been $77,853.45 (p. 28), or in their second report $108,347.66. (p. 32.) This assumption would be correct only if the actual physical inventory at the Sacramento Street plant were $88,272.55. This cannot be assumed.

As to the errors of accountants criticized by counsel, we can only quote the testimony of their own accountant given later in the trial:

> "I think they have all done fairly, fairly done their work, fairly well, so far as I know."
>
> (Testimony of Hart; V. V, p. 2391.)

As to claimed duplications, we ask the Court to refer to this brief, supra, pages 32-53.

Pages 43-45. Again we refer to the question of duplications in this brief supra, pages 32-53.

Counsel are in error as to the starting basis of the first Hood & Strong report of November 29th, whereby values of $102,453.22 were calculated. This calculation was made after deduction, or without adding in, the adjustment of $20,734.89. This is shown by their own accountant. (V. V, pp. 2373-4.)

Pages 46-76. We refer again to the discussion of duplications in this brief, supra, pages 32-53.

It may be that there was a duplication of the item of $22,737.12, though it could not be definitely determined after much investigation. We believe the evidence shows definitely that there was no duplication in any other item.

If there is a duplication, there is not one word in the evidence, nor any suggestion that it is attributable to any act of appellant.

Pages 76-88. Appellant's proof tended to show:

1. The value of the material on hand at the time of the fire.

2. The value of the material remaining after the fire.

3. The amount of damage to the material remaining after the fire.

The difference between the value of material on hand at the time of the fire and that remaining after-

wards was deemed to be burned up or out of sight loss.

Plaintiff believed material was burned up in the fire. No one could state accurately what was on hand before the fire, therefore, plaintiff had to depend on accountants to determine this fact.

Although there was much *swearing* by Smith and Radford and other witnesses for the insurance companies that nothing was burned up, there was plenty of evidence that there were ashes and burned cotton and burlap materials hauled out after the fire. Evidently the trial court believed that the witnesses for the insurance companies were not telling the truth in this regard for the court *found there was an out of sight loss.*

Appellees' calculations as to the merchandise which would have been represented by the debris are ridiculous. We never claimed, and no witness testified, that all the debris hauled away was merchandise debris.

Pages 88-102. Any over-grading or over-pricing of merchandise on the Radford inventory was to the benefit of appellees and could not, even if knowingly done, constitute false swearing. (There is nothing in the evidence to indicate that any over-grading was other than merely a mistake, perhaps Radford's, the employee of appellees; or that any over-pricing was other than by mistake or in accordance with an understanding between Sugarman, appellant's adjuster, and Smith, adjuster for some of appellees.)

We demonstrate this in the following manner:

The court finds the value of the stock at the time of the fire was $88,000.00. (V. I, pp. 178-79.) While we believe this amount is too low, we assume that it is correct for our present purpose.

The court also finds that the out of sight loss is the difference between the Radford inventory and the value of the stock before the fire, and the court finds this is approximately $2,000.00. (V. I, p. 185), and the Radford inventory is in round figures $86,000.00.

Now, whatever the price or grade of the merchandise remaining after the fire, the percentage of damages would be the same, and let us assume that the percentage of damage to all merchandise remaining, whether due to fire, water, smoke or chemicals, was 50%.

The calculation of appellant's loss then would be as follows:

The Radford inventory was the merchandise salvaged from the fire.

Value before fire	$88,000.00
Radford inventory	86,000.00
Difference—out of sight loss	$ 2,000.00
50% damage on Radford inventory	43,000.00
Total damage	$45,000.00

Now, let us assume that through over-grading and over-pricing, the Radford inventory was greater than it should have been, and that actually it should have been only $80,000.00 instead of $86,000.00.

The calculation is then as follows:

Value before fire	$88,000.00
Radford Inventory (Eliminating over-grading and pricing)	80,000.00
Difference—out of sight loss	$ 8,000.00
50% damage on Radford inventory after correction	40,000.00
Total damage	$48,000.00

It is thus a mathematically demonstrable fact that any errors of over-pricing or over-grading of merchandise in the Radford inventory was beneficial to appellees, since the more the inventory of remaining goods was over graded or appraised the less would be Hyland's loss.

As we have elsewhere shown, the question of out of sight loss was in conflict. The weight of the evidence was that there was an out of sight loss and the court so found.

Pages 102-108. The percentage of damage to the salvaged merchandise was a mere guess on the part of anyone. After the Radford inventory was completed, Mr. Ben Sugarman placed opposite each item his estimated percentage of the damage thereto.

> "The percentage of damage that I estimated was the damage to that value in those lots as Radford had inventoried them. That was intended by me to be an estimate, that was my judgment."
>
> (V. II, p. 987.)

A document showing Sugarman's estimated percentage of damage to the items on the Radford inventory was received in evidence as Defendants' Exhibit P. (V. II, pp. 1006-07.) Sugarman mentioned "that every item in the building was damaged some." (V. II, p. 1007.)

Whatever difference may exist as to the percentage of damage given by Sugarman and the witnesses for appellees cannot be put down to anything but a difference in opinion.

The actual loss sustained by appellant was determined by the auction sale which the court holds "was apparently consented to by the insurance companies." (V. I, p. 191.) This auction was held several months after the fire, but in the meantime appellant had been required to hold the goods for the benefit of the insurance companies, and hence it is in entire accord with justice that the burden of expenses and price declines in the meantime should fall on them.

Assuming the auction determined the damage to plaintiff, this damage is the difference between the net proceeds thereof and the inventory, plus the out of sight loss. The Radford inventory was $86,807.98; the net proceeds of the auction sale were $27,742.32. (V. III, p. 1661.) The difference is $59,065.66, which represents the loss on salvaged merchandise, and to this must be added the out of sight loss which at the low figure found by the court was at least $2,000.00. *It thus appears that appellant's total damage was at least $61,065.66.*

Pages 109-122. We refer the court to our reply to pages 76-88 of appellees' brief, supra, this brief pages 76 to 77, for a consideration of claimed over-grading and over-pricing. It appears conclusively that any over-pricing or over-grading of the Radford inventory was beneficial and not harmful to appellees, and could not have been fraudulent.

Moreover, it is absolutely impossible to read all the testimony pertaining to the pricing and grading and state that anything was knowingly and intentionally and fraudulently over-priced or over-graded. Appellant may have been negligent in not closely examining the proof of loss which was filed.

> "The law favors the insured to the extent of excusing a careless statement if it does not proceed from a fraudulent and willful intent."
>
> *Miller v. Firemen's Fund Ins. Co.,* 6 Cal. App. 395-400.

Pages 123-130. The whole matter of the claimed "Fictitious contracts" has been discussed supra this brief, pages 10-19 to which we ask the court to refer.

There were no fictitious contracts, and the overwhelming weight of the evidence is that there were not.

Pages 130-134. This portion of appellees' brief presents as baseless an attack upon a litigant and a witness as the writer of this brief has ever experienced. We ask the court to read the entire testimony of Mr. Hyland, commencing with V. VI, pp. 3257-3261 on direct examination, and the entire cross-examination on the same subject matter from V. VI, pp. 3289-3310,

and see that the witness was attempting to answer to the best of his ability every question put to him.

The subject matter pertained to prices. Mr. Logie testified to prices on behalf of defendants. These prices covered a portion of the material in the Radford inventory. Bemis prices had also been introduced. Mr. Hyland made notes of the prices testified to by Mr. Logie, which even counsel for appellee conceded were substantially correct. (V. VI, p. 5309.) Mr. Hyland then repriced the Radford inventory after corrections for errors in grades on his own prices, on the Logie prices, and on the Bemis prices. He did not reprice any items except those which Mr. Logie gave a price on.

Because he set forth exactly what he did in his direct and cross-examination, the appellee uses it as a basis for reflection and insinuation against him. It was obvious throughout the trial that Mr. Hyland had not a good memory for figures. This appeared at the very beginning of the trial where he referred to a memorandum and stated that he could not remember the figures without it. (V. I, p. 243; V. I, p. 245.)

We again refer the court to pages 81-83 of this brief, wherein it appears that any overvaluation of the Radford inventory was beneficial to the appellees and detrimental to appellant, and could not have been fraudulent.

Pages 134-139. As to the auction sale, it is apparent that there is no criticism of its fairness, or that the highest price obtainable was not received for the

damaged stock. The court below was apparently of the view that it was consented to by Smith, adjuster for some of appellees, as a method of determining the loss. Smith was the head of the adjusters and whatever he did was agreeable to the others. Since the delay in disposing of the damaged merchandise was caused by the requirements of the insurance companies, the auction sale was a fair method of determining the loss.

Plaintiff did sell out to the Pacific Bag Company in January, 1930 (Plaintiff's Exhibit No. 166; V. VI, p. 3266), but this matter was never even thought of before the fire. (V. VI, p. 3236.) The suggestion came from Mr. Sugarman. (V. VI, p. 3265.) The negotiations were started in December, 1929. (Testimony of Sugarman, V. VI, pp. 3089, 3088.)

In view of this testimony, the insinuations in reference to the sale and the fire are nothing less than contemptible.

Pages 139-142. As to the claim of this appellee to a limited liability, we refer the court to pages 46-68 of the brief for Dubuque Fire & Marine Ins. Co., et al, for reply.

Pages 142-145. We are not in disagreement with the law stated.

Pages 145-154. For our consideration of the law of false swearing, we refer the court to appellant's brief, pages 23-25, and this brief supra pages 63-65.

Most of the authorities cited have no pertinency to this case.

The question of fraud is not involved as a defense but only false swearing.

In California, the claimed sworn false statement must be material, must be wilfully and knowingly false, must have been intended to deceive, and must have been capable of deceiving. A negligent or inadvertent statement will not constitute false swearing.

An excessive claim in a pleading or false testimony will not cause a forfeiture.

Nor will a false statement by an agent, cause a for-forfeiture. It must be the act of the insured.

The law of California is particularly strong against forfeitures, and favors a waiver thereof. The question has never been directly decided by our appellate courts, but the inclination of the California courts makes it likely that they would not hold that an excessive claim after loss could constitute false swearing under the provisions of the policies here involved.

As a matter of law or fact we do not believe that false swearing can be predicated upon a claim which is made in reliance upon and in accordance with a report of certified public accountants.

Pages 155-166. To appellant's brief, pages 8 to 18, we add the following:

Application of the general rule cited that findings of the chancellor based on conflicting evidence are presumably correct, and will not be set aside unless a serious mistake of fact appears, should cause this court to disregard the claimed findings in this case.

We believe that we have shown in appellant's brief thirty pages of condemnatory argument are not findings in accordance with Equity Rule 70½.

Many serious mistakes of fact and law appear therein. As one instance of fact, we refer to the court's statement that "if the quantity of merchandise claimed to have been obliterated, had been in the factory at the time of the fire * * * the building * * * would have been taxed with a load beyond its capacity." (V. I, p. 193.) Counsel now admit that this statement, argument, or finding is erroneous. (Brief of Western Insurance Co. of America, p. 186.) That such a prejudicial statement is not correct, removes the presumption of correctness from other statements in the opinion.

We point out also that on the substance of this case showing the basis of appellant's claim, arrived at through the reports of excellent and reputable accountants on which he relied, there is no conflict in the testimony.

Pages 166-170. We have repeatedly pointed out that any over-pricing or over-grading was beneficial to appellees.

Appellee claims that waiver of false swearing should have been pleaded. This is not the law.

Plaintiff is required only to plead performance of conditions precedent on their waiver.

False swearing is an affirmative defense.

No replication is permitted. It is deemed denied, and the plaintiff under the denial can show any facts

which will overcome the defense. Equity Rule 31 provides for this, and the practice is so well known that no citation of authority is required.

Pages 171-174. The omission to discuss the appellant's claim in the amended complaint to which counsel refers has been remedied by consideration in this brief, supra, pages 62-68.

The matter of pricing and grading has been fully considered.

The claim of appellant for an out of sight loss, denied by appellees, is fully justified by the finding of the court that it did sustain an out of sight loss.

Of course, no one could say exactly what the burned up merchandise consisted of, because no one knew exactly what merchandise was in the plant before the fire.

Pages 174-176. Appellee again returns to pricing and grading, the immateriality of which has been fully considered.

The circumstances of this case show that plaintiff had to rely on reports or accounts of others.

Let us suppose that appellant's books had shown an inventory of $200,000.00, and appellant had filed a claim on that basis. Appellant would then have been criticized for not having an audit and report of certified public accountants. Now, because he did have an audit and report of certified public accountants, apparently he is criticized for using their report.

Pages 176-178. We do claim that there were no suspicious circumstances surrounding this fire so far

as appellant is concerned. We have assumed that the fire was incendiary, but the insinuations against appellant are unjustified and contemptible.

Pages 178-182. As to the statement of counsel that appellee was not permitted to examine plaintiff's books, we refer only to the statement of thir own accountant:

> "When I first examined the books Mr. Taylor gave me every assistance. As to our investigation during the Use & Occupancy, apparently we were not prevented from looking at any of the books or records of the Hyland Bag Co. at all. We were not limited in our examination."
>
> (Testimony of Hart, V. IV, p. 2325.)

This examination occurred immediately after the fire.

Apparently, appellees knew much more about appellant's books than appellant himself knew.

Pages 184-187. The matter of claimed over-pricing and grading, and the immateriality thereof has been heretofore fully demonstrated.

Pages 187-192. As we understood the finding of the court referred to, it was a personal criticism of appellant for testifying to one thing, and then testifying to the opposite at another point in the trial. As we have pointed out, appellant never claimed that his books were accurate, nor did he claim them to be inaccurate. He left that necessarily to accountants to determine. Hood & Strong said they were adequate and evidenced proper accounting. (V. I, p. 247.) Evidently Ernst &

Ernst thought they were sufficient. Mr. Hart for appellees deemed they were inaccurate.

B. REPLYING TO BRIEF FOR APPELLEE, MILLER'S NATIONAL INSURANCE CO.

This brief differs only slightly from the brief of appellee, Western Insurance Co. of America. The appellee, Western Insurance Co. of America claimed, pages 139-142, that it was not here liable under its particular policy, and it did not demand appraisal. Appellee Miller's National Ins. Co. demanded appraisal and on pages 174-179 discusses the failure of appraisal. We believe that this matter is fully covered in this brief, supra, pages 9-30, and in appellant's brief heretofore filed, pages 67-76, and we ask the court to refer thereto.

In no other respects is the brief of appellee, Miller's National Insurance Company different from that of appellee, Western Insurance Company of America, and therefore, for our reply to other matters in the brief of Miller's National Insurance Company we refer the court to our reply to the brief of Western Insurance Company of America.

C. REPLYING TO BRIEF FOR APPELLEES, DUBUQUE FIRE & MARINE INSURANCE COMPANY, ET ALS.

Pages 2-8. The insinuated incendiarism of appellant designed to prejudice this court has been referred to in this brief, supra, pages 3-7.

Why should this court believe that the insurance companies attempted to reach an adjustment, or that appellant only pretended to?

There is not one word of evidence that Hyland ever notified a single person not to give out prices, and while Smith claimed he could not obtain prices and that appellant did not give his cost prices, the testimony of appellees' own accountant was that he was not prevented from looking at any of the books and records of appellant. (V. IV, p. 2325.) No physical inventory was suppressed and none was taken at the plant four days before the fire (V. II, p. 761), etc.

It is impossible in the time permitted to prepare this brief, to reply to all the misstatements and vituperation directed at appellant.

We are aware that appellees burn with the consuming fire and unrighteous wrath of insurance companies striving to evade payment of a just obligation. We know that this court will be guided by a just consideration of the record.

In connection with counsel's insinuations, we ask the question, If there had been anything improper or not bona fide as to appellant's claim, would he not have settled it as quickly as possible, and plucked the fruits of his wrongdoing?

The matter of the appraisal has been fully considered in appellants' brief, pages 67-76, and in this brief, supra, pages 9-30.

The amount of damage to the salvaged stock is disputed and was never determined, except by the auction sale. This auction sale was at the suggestion or with the agreement and consent of Mr. Smith, adjuster for some of appellees, and its bona fides has never been questioned.

The questions of alleged false swearing are elsewhere fully considered.

As to the claim that the findings will not be set aside, etc., we have pointed out that there are really no findings in this case, but if they are deemed findings it is conclusively apparent that the chancellor labored under serious mistake, both of fact and law, and the presumption which ordinarily attends them is swept away.

Pages 8-23. Appellee attempts to uphold the opinion of the trial court as findings by selecting a paragraph or sentence here and there. We ask the court to consider what is omitted, as well as the excerpts made by appellee.

Even by selection in the manner stated, we believe it is apparent that as findings the opinion of the court does not comply with Equity Rule 70½. The issues are not correctly stated, findings are not made directly upon the principal issue, the claimed findings are argumentative, and much of the opinion concerns matters not in issue. We ask the court to refer to appellant's brief, pages 8-18, wherein the matter is sufficiently covered.

We have demonstrated that any over-pricing or over-grading was immaterial to appellees, supra, pages 81-83, nevertheless we add that there is not any evidence of any kind in the record that appellant ever suggested any over-grading or over-pricing or that he ever suggested to or solicited from any accountant or any other person an untrue or exaggerated statement, or that he ever placed a figure in his books or on his

records, or suggested the placing of any incorrect figure therein. If he ever swore to an untrue statement, it was by reliance on others and through mistake of accountants. Neither mistake or negligence constitute false swearing.

It is an absolutely untrue statement to say that appellant ever suppressed any record.

The amount of appellant's damage was in dispute, and that is what caused this action.

Pages 24-25. The law of false swearing has been elsewhere fully considered. We refer to appellant's brief, pages 23-25, and this brief, pages 69-73.

We ask this court to note particularly that appellee cites no California cases, and it is the law of California which should be applied in this case.

Pages 26-34. We do not believe it is worth while to go into the conflicting testimony as to the extent of the fire. The firemen did a good job and deserved and received great credit. Chief O'Neil testified:

> "On coming in on the alarm of the fire we thought we would lose the building, and then it was just a question of confining the fire." (V. IV, p. 1849.)

The official report of the fire department of San Francisco indicated that it was more serious than counsel for appellees seem to state in their brief. (Plaintiff's Exhibit 168; V. VI, pp. 3376-8.) This report shows that the fire lost four hours after the fire apparatus arrived and 26 officers and 113 men were used. That the low pressure hose was in use for two

hours. However, arguing on this matter we believe is fruitless, so likewise is consideration of such questions as to the extent of water in the basement, or the smell of kerosene in the building.

Pages 35-48. In this section appellees consider:

(a) Appellant's knowledge of his business; changes in stock cards.

(b) Claimed wrongful acts of employees.

(c) Claimed contradiction in appellant's testimony and conflict with testimony of others.

(d) Claim that appellant responsible for any wrongful acts of his employees.

Although these matters have been covered, at the risk of repetition, we refer to them briefly at this point:

(a) Reference to appellant's knowledge of his business and criticized changes in inventory stock cards.

Apparently from the fact that appellant bought most (not "all" as appellees claim) of the raw materials used in his factory, and did all the selling, and was familiar with the forms used in his business, appellees would charge him with a detailed knowledge of the merchandise on hand in his factory (which he indisputably was not personally managing) at the time of the fire. The ridiculousness of such contention must be obvious to this court. Appellant was doing a business of over $2,000,000.00 per year. His stock was divided between his factory and a warehouse. It totalled at the lowest figure slightly more than $153,000 (on ledger) and the highest $196,000 (Hood & Strong 2nd

report), and it consisted of hundreds of items of raw material, material in process, and completed products. Likewise, apparently appellees would charge appellant with a detailed knowledge of his books when he did not do the bookkeeping, and with all entries in his records, when he made none of the entries.

More than human capacity should not be attributed to appellant. He had to rely on others, and particularly on accountants.

Appellees criticize the change of dates of inventory stock cards, which Taylor testified were made by him, but could not explain when first on the stand (V. III, pp. 1463-4), and whereby appellees claim duplication occurred. We have discussed the matter of duplication and changes in stock cards, supra, this brief, page 55-57.

There is absolutely no basis on which to claim Taylor made any wrongful entries, and there is not even a suggestion in the evidence that appellant ever knew anything about the confusion in these cards, or had anything to do with it.

(b) Claimed wrongful acts of employees.

As has been shown before any over-grading and over-pricing was immaterial and not tending to injure appellees, supra, this brief, pages 81-83.

However, there is absolutely nothing to indicate that any misgrading of merchandise in the Radford inventory was attributable to anything except mistake. It may have been the mistake of Radford, or it may have been the mistake of Kraus. In either case it was not caused by appellant.

Taylor priced the items of merchandise placed before him without thought whether they were actually there or not. In this matter, we are beginning to suspect that there was a "nigger in the woodpile," and that possibly Radford planted this misgrading in an effort to entrap appellant. We are certain that counsel for appellees was aware of the error in grading some of the merchandise when he cross-examined Gus Kraus (V. II, pp. 794-5), the man who assisted Radford in the grading, and we are likewise certain from reading the same testimony that Mr. Kraus was absolutely unaware of the fact that any error had been committed. Radford was Smith's man. Any misgrading might have been a clever idea of Mr. Smith.

Appellees also states that damage was claimed on merchandise that was not damaged. The reply to this is that Sugarman testified that he believed every item in the building was damaged to some extent, either by fire, water, smoke, or otherwise.

(c) Claimed contradictions in appellant's testimony and conflict with testimony of others.

There were no false statements in appellant's testimony at the trial, but even if there had been, such statements are not cause for forfeiture, supra, this brief, pages 68-69.

The evidence does not show any false testimony or false records by any accountant or other person employed by appellant, in connection with his claims, but even if such other persons had been guilty of false testimony or false records, this would not be a cause for forfeiture of appellant's claim.

This court cannot assume that Adjuster Smith wherever he testified, was speaking gospel, and cannot assume that Radford, paid by plaintiff and ostensibly working for him, but secretly working for and receiving private instructions from Smith (V. VI, p. 2801), was cloaked in a mantle of truth.

We point out that Smith swore there was no out of sight loss, yet the court found there was an out of sight loss.

We also point out that Smith swore that nothing was said to him about an auction sale (V. V, pp. 2762-3), when his own letter signed by himself showed that the auction was considered. (V. V, pp. 2769-70.)

Everyone is subject to mistakes. We do not exclude Mr. Smith or the appellant in this case. For instance, appellant was wholly mistaken if he said a condensed report of the merchandise on Sacramento Street on October 15, 1929, was shown him, for none was made up at that time. (Dubuque brief, p. 39.) However, one was made for Sansome Street. Mr. Hyland either had an error in memory, a slip of the tongue, or possibly even the Court Reporter wrote Sacramento Street when he should have written Sansome Street.

We refrain from discussing other claimed contradictions, etc., for we believe that this court will find that matters referred to by appellees are of no consequence.

(d) As to the legal claim that any rights of appellant could be forfeited by wrongful acts of others, we have nothing to add to what has been heretofore said, supra, this brief, pages 70-73, and appellant's brief, pages 58-59.

Equity abhors a forfeiture against a person for his own wrongful acts, and certainly will not countenance the forfeiture of a person's rights for the wrongful acts of another.

Pages 48-60. The question of the appraisal which failed has been discussed in this brief, supra, pages 9-30, and in appellant's brief, pages 67-76, and we ask the court to please refer thereto. The only two cases cited are two old California cases which are not authorities under the terms of the policies here involved.

Pages 60-62. We believe that where an insurance company deals with an insured for months as though no forfeiture had occurred, carries on negotiations, claims no forfeiture, and in the meantime the insured is caused a loss of thousands of dollars by expenses incurred and a falling market, which could have been saved in part if liability had been denied and the claimed forfeiture asserted, the insurance company will be deemed to have waived the claimed forfeiture which is asserted for the first time by an answer filed to an action.

The Supreme Court of Idaho has held that a claimed forfeiture for false swearing is waived where it is not asserted prior to answer.

> *Young v. California Ins. Co.*, 46 P. (2) 718, 722, (Idaho, 1936).

The question of false swearing by a pleading or by testimony has been considered in this brief, supra, pages 62-68, to which we ask the court to refer.

Pages 63-70. We are in accord with the statement of the appellees in reference to policy coverage.

D. REPLY TO BRIEF OF APPELLEE, NATIONAL LIBERTY INSURANCE CO.

We believe that every point made in the brief of appellee, National Liberty Insurance Co., has been discussed.

To go through it in detail and reply thereto would unduly prolong this brief and increase the burden of the court. We, therefore, refrain from replying to it separately.

CONCLUSION.

We have endeavored to place before this court the salient points of this case. We believe a consideration of the law and facts requires a reversal, and therefore pray that the court reverse the judgment of the District Court.

Dated, San Francisco,
May 11, 1936.

Respectfully submitted,
MORGAN V. SPICER,
Attorney for Appellant.

WILLIAM S. GRAHAM,
W. W. SANDERSON,
J. W. MCCAUGHEY,
ROBERT W. JENNINGS,
W. H. METSON,
Of Counsel.